82-1188

No. .....

In The

Supreme Court of the United States

October Term, 1982

WOMEN'S SERVICES, P. C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

LADIES CENTER, NEBRASKA, INC., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

WOMEN'S SERVICES, P. C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

On Appeal from the United States Court of Appeals for the Eighth Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

1. Whether state legislation regulating the performance of abortions during the first trimester is in all instances subject to strict scrutiny under a substantive due process analysis.

LIST OF PARTIES

The names of the parties to the action below are set out as follows:

Appellants, Charles Thone, Governor of the State of Nebraska: Paul L. Douglas, Attorney General for the State of Nebraska; Donald L. Knowles, County Atttorney for County of Douglas, State of Nebraska;

Intervenor, Marilyn A. Schneider;

Appellees, Womens Services, P.C., a Nebraska Corporation; William G. Orr, M. D.; Ladies Center, Nebraska, Inc., a corporation; John M. Epp, M. D., Betty Roe, by her next friend, Barbara Gaither; and Elizabeth F.

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OPINIONS BELOW

The original opinion of United States District Court Judge Warren K. Urbom is reported at 483 F. Supp. 1022 and appears as Appendix ("App.") A hereto.

The original opinion of the Eighth Circuit Court of Appeals is reported at 636 F. 2d 206 (8th Cir. 1980) (App. B).

The Order of the U. S. Supreme Court is reported at 452 U. S. 911 (1981) (App. C).

The Order of Remand of the Eighth Circuit entered on July 23, 1981 is unreported (App. E).

The Second Memorandum and Order of Judge Warren K. Urbom issued on May 24, 1982 is unreported (App. F).

The final opinion of the Eighth Circuit Court of Appeals issued October 14, 1982 is unreported (App. G).

JURISDICTION

This is the second appeal to this Court of a civil rights action brought pursuant to 42 U. S. C. § 1983 which challenges the constitutionality of certain abortion control statutes enacted by the State of Nebraska. This appeal is taken from a final order of the Eighth Circuit Court of Appeals which held certain portions of those statutes to be invalid as repugnant to the Fourteenth Amendment of the Constitution of the United States.

The final judgment of the Eighth Circuit Court of Appeals was entered October 14, 1982. Appellants' notice of appeal was filed on November 10, 1982 (App. H).

Jurisdiction is conferred upon this Court pursuant to 28 U. S. C. § 1254 (2).

STATUTORY PROVISIONS

Neb. Rev. Stat. § 28-325, et seq. (Reissue 1979).

The statutes cited above are lengthy; therefore, their pertinent text is set forth in App. E hereto.

STATEMENT OF THE CASE

A. Procedural Overview

This is the second appeal to this Court of three consolidated civil rights actions challenging certain abortion control statutes enacted by the State of Nebraska. At issue are statutes which require: (1) that a woman seeking an abortion must affirm in writing that she has been advised of the reasonably possible medical and mental consequences of abortion, childbirth and pregnancy; (2) a waiting period of forty-eight hours following the execution of an informed consent document; (3) the reporting of prescribed abortions to the Nebraska Department of Health.

After a full hearing, the trial court entered a memorandum and order dated November 9, 1979, in which it held:

(1) That a subpart of the statutory definition of informed consent, Neb. Rev. Stat. § 28-326(8)(a) was an unconstitutional abortion regulation.[1]

(2) That a forty-eight hour waiting period, Neb. Rev. Stat. § 28-327 was an unconstitutional abortion regulation.

(3) That Neb. Rev. Stat. § 28-343, as it pertained to "prescribed abortions" was an unconstitutional abortion regulation.

In a per curiam opinion issued December 8, 1980, the Eighth Circuit Court of Appeals affirmed the trial court's judgment in all respects and based its affirmance "primarily on the basis of the district court's decision." *Women's Services, P.C. v. Thone*, 636 F. 2d 206. The Appeals Court added that because of intervening cases of the United States Supreme Court and "for other reasons" it would comment briefly on each aspect of the decision. Addressing the challenged statutes the Eighth Circuit held "that legislation which directly interferes with a woman's fundamental right to decide to terminate her pregnancy is

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1 Neb. Rev. Stat. § 28-327 prohibits the performance of an abortion in the absence of an "informed consent" which term is defined by Neb. Rev. Stat. § 28-326 (8) (a) and which states in relevant part:

> Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, . . .

subject to *strict scrutiny* under a substantive due process analysis." Id. at 210.

The original decision of the Eighth Circuit was appealed to the United States Supreme Court and was docketed as Case No. 80-1509.

The United States Supreme Court, on June 8, 1981, vacated the judgment of the Eighth Circuit Court of Appeals and remanded the case "for further consideration in light of *H. L. v. Matheson*, 450 U. S. 398 (1981). *Thone v. Womens Services, P.C.*, 452 U. S. 911 (1981) (App. D). The Eighth Circuit then remanded the case to the district court for reconsideration (App. E).

Following the remand to the district court the Appellees were allowed to amend their petitions to cure any "standing" defects. Thereafter the Appellants did not oppose a finding of unconstitutionality of the Nebraska statute which required parental consultation by a minor under the age of 18, Neb. Rev. Stat. § 28-333 (1979) and the district court again held said statute to be unconstitutional. The appellants *did not* appeal that portion of the district court order to the Eighth Circuit and it is not at issue here.

The district court also reaffirmed the unconstitutionality of three other Nebraska statutes which required, (1) the giving of informed consent, Neb. Rev. Stat. § 28-326(8) and § 28-327 (1979); (2) a 48 hour waiting period, Neb. Rev. Stat. § 28-327 (1979); and (3) reporting of prescribed abortions to the Nebraska Department of Health, Neb. Rev. Stat. § 28-343. See App. C for complete text of the challenged statutes.

Both at the district court and on appeal to the Eighth Circuit the defendants argued that the Order of this court entered on June 8, 1981 (App. D) mandated that

a more lenient standard of review be used in judging the constitutionality of *all the challenged statutes* in light of *H. L. v. Matheson.* The district court simply ignored the plea and addressed only the issue of parental consultation, Neb. Rev. Stat. 28-333, and after reading *H. L. v. Matheson* reaffirmed its prior judgment (App. F). To its credit, the Eighth Circuit directly confronted the issue of whether "the Supreme Court in *H. L. v. Matheson, supra,* set out a new standard of review for statutes which regulate abortions". *Womens Services, P.C. v. Thone,* Case No. 82-1786, *Slip Op.* (8th Cir., 10/14/82) (App. D). The Eighth Circuit, in a per curiam opinion found that *H. L. v. Matheson* did not impose a new standard of review for state abortion statutes and affirmed the district court decision which applied "a strict scrutiny standard". The appellants then filed this appeal (App. H).

The appellants again stress that they have absolutely abandoned any claim of constitutionality of Neb. Rev. Stat. § 28-333 (1979) which required "parental consultation". We seek reversal of the final judgment of the Eighth Circuit Court of Appeals holding Neb. Rev. Stat. § 28-326 (8) and § 28-327 (1979) (informed consent), Neb. Rev. Stat. § 28-327 (1979) (48 hour waiting period), and Neb. Rev. Stat. § 28-343 (the reporting of prescribed abortions) unconstitutional. We argue that the courts below have refused to follow the specific mandate of this court in *Thone v. Womens Services, P.C.,* 452 U. S. 911 (1981).

B. Statement of Facts

Substantial testimony was presented at trial in regard to the manner of medical practice of the appellees' abortion clinics and the medical complications of abor-

tions performed at all stages of pregnancy. Included in this latter subject was expert testimony of Dr. Leslie Iffy, an internationally recognized physician, a specialist in the fields of both obstetrics and gynecology and neonatology, and the author of numerous scholarly articles on the subject of long term medical complications of induced abortions[2] (T1598:5-1602:1).[3] Dr. Iffy gave as his principal expert opinion that one single abortion performed during the first trimester closely doubles the rate of premature births in subsequent pregnancies (T1619:7-11). Dr. Iffy further testified that prematurity is the leading cause of death or physical and mental disability in children (T1622:12-25) and that each subsequent abortion relatively increases the risk of prematurity (T1619:7-11).

Appellants at trial also presented evidence that appellee Womens Services, P.C. engaged in virtually no counseling of its abortion patients (T1033:4-1036:15), that physicians of both of appellees' abortion clinics often never saw the abortion patient until she was on the procedure table, that the clinics were performing abortions on an assembly line basis, and that there was no doctor-patient

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2 Of additional note in regard to Dr. Iffy's qualifications and lack of any personal bias was his testimony which reflected his clinical experience of having performed numerous abortions during his twenty-five year plus medical career and the lack of any impeachment evidence that Dr. Iffy has ever expressed or shared in an opinion that abortion is morally wrong.

3 The transcript of trial testimony (T) is in the custody of the Clerk of the Eighth Circuit Court of Appeals. Appellants have not elected, pursuant to Supreme Court Rule 13, to certify the record to this Court since we do not deem it essential, but we do feel that reference to the record is necessary for a proper understanding of the case and its importance.

relationship established (T252:15-264:25; T1268:11-1273:21).

The evidentiary record below also disclosed that only in the most rare of occasions has a woman ever been provided an abortion by either of appellees' abortion clinics within forty-eight hours of her request for medical treatment. The testimony of abortion clinic personnel proved that for the vast majority of abortion clinic patients there was a delay of from seven to ten days between the time the abortion was first requested and its actual performance (T56:5-60:5; T306:16-25; T1024:9-1025:7).

Further testimony of Dr. Leslie Iffy on the issue of a forty-eight hour delay included his personal observation that during the twenty-five plus years he had performed abortions, he had never found it necessary to perform an abortion within forty-eight hours of the patient first having presented herself (T1726:12-20).

Appellees' expert witness, Dr. Christopher Tietze, an internationally recognized medical statistician, testified that a delay of forty-eight hours during the first trimester would be "clinically unimportant." When asked to define "clinically unimportant," Dr. Tietze stated, "I would draw no conclusion as to whether it was desirable to do it [abortion] earlier or to do it later." (T957:3-6).

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THE QUESTIONS ARE SUBSTANTIAL

ARGUMENT

I.

This appeal raises an important and recurring issue regarding the proper legal standard of review to be used by federal courts in judging the constitutionality of state statutes regulating the performance of abortions.

In the interest of judicial efficiency, we first point out that this appeal is closely related (if not absolutely subject to the control of this court's anticipated decision) to *City of Akron v. Akron Center for Reproductive Health, Inc., et al.*, Case. Nos. 81-746 and 81-1172. These appellants in fact totally endorse the argument made in the brief of the petitioner, City of Akron, found at pages 18-24. It is of further interest to note that the petitioner, City of Akron, relies upon the prior decision of this court in *Thone v. Womens Services*, 452 U. S. 911 (1981).

This appeal involves laws enacted by the State of Nebraska which have, as their primary aim, the protection of the decision making process of women who seek abortions. In affirming the initial holding of the District Court that these statutes were constitutionally defective, the Eighth Circuit held that the statutes directly interfered with "a woman's fundamental right to decide whether to terminate her pregnancy . . .", and were thus, ". . . subject to strict scrutiny under the substantive due process analysis". *Womens Services, P.C., et al. v. C. Thone, et al.*,

636 F. 2d 206 at 210. Appellants challenged this holding in an appeal to the United States Supreme Court and we specifically addressed, as our primary issue on appeal, the conflict among the Circuits regarding the proper standard to be applied to abortion control statutes. The question put to the Supreme Court in our prior appeal was "whether state legislation regulating the performance of abortions during the first trimester is in all instances subject to strict scrutiny under a substantive due process analysis." The answer of the Supreme Court was to remand the case to the District Court for further consideration in light of *H. L. v. Matheson. Thone v. Womens Services,* 412 U. S. 909 (1981).

We therefore believe that the District Court was compelled to look to *H. L. v. Matheson,* supra, and determine the proper standard of review for abortion control legislation. *H. L. v. Matheson,* supra, speaks directly to this question with the following language of Chief Justice Burger:

> The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate governmental objective of protecting potential life.
>
> 450 U. S. 298, 303 (1981).

After 4 plus years of litigation we still have not arrived at any determination of what legal standard of review is applicable to state legislation which attempts to insure that the abortion decision "be made with full knowledge of its nature and consequences", *Planned Parenthood of Central Missouri v. Danforth,* 428 U. S. 52, 67

(1967). The constitutionality of legislation calling for a more detailed informed consent than that found in *Danforth*, and the inclusion of a *waiting period* to insure that the informed consent information be carefully weighed is admittedly dependent upon a standard of review which would require a showing of an "undue burden" on the abortion decision making process. Directly supporting this relaxed standard of review is the following language of this Court:

> In *Planned Parenthood of Central Missouri v. Danforth* we today struck down a statute that created a parental veto. . . . At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion.
>
> *Bellotti v. Baird*, 428 U. S. 132, 147 (1976).

In similar language in *Maher v. Roe*, 432 U. S. 464, 473 (1977), the Court held:

> Although a state created obstacle need not be absolute to be impermissible, . . . we have held that a requirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." (Citations omitted.)

This legal standard of review was adopted by the Sixth Circuit in *Wolfe v. Schroering*, 541 F. 2d 523, 526 (1976), which case involved the challenged constitutionality of a 24 hour waiting period statute enacted by the State of Kentucky. The *Schroering* court clearly identified the legal standard adopted by it in the following language:

> The district court invalidated the waiting period requirement because "it attempts to regulate the abortion procedure during the first trimester during which time the state has no compelling interest and thus

> can pass no regulation affecting this period." *Danforth* (citation omitted) rejected similar reasoning.

Id. at 526.

Those who oppose abortion regulation laws urge the adoption of the legal standard chosen by the Seventh Circuit in *Charles v. Carey*, 627 F. 2d 772 (1980), the Sixth Circuit in *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F. 2d 1198 (1981) cert. granted 50 USLW 3934 (May 24, 1982), the Fifth Circuit in *Deerfield Medical Center v. City of Deerfield Beach*, 661 F. 2d 328 (1981) and the Eighth Circuit in the instant action and in *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 655 F. 2d 848 (1981) cert. granted 50 USLW 3934 (May 24, 1982). They argue that any statues which regulate first trimester abortions, carry criminal penalties, and impose any restrictions to the effectuation of the decision to abort, must be supported by a compelling state interest. *Charles v. Carey*, supra, at 777, 778. The original decision of the trial court in this action specifically addressed this issue:

> Absent an emergency situation, the informed consent and waiting period requirements would stand between the woman's desiring an abortion and obtaining one. This is a direct obstacle to abortion. *Womens Services, P.C. v. Thone*, 483 F. Supp. 1022, 1043 (D. Neb. 1979).

In so holding, the trial court recognized that considerable confusion and conflict existed as to the proper legal standard to be used in light of post-*Roe v. Wade*, decisions, including specifically, *Bellotti v. Baird*, 428 U. S. 132 (1976), which it admitted did possibly indicate "some retreat from the stiff no-interference-during-the-first tri-

mester standard clearly adopted in *Roe v. Wade,* 410 U. S. 164." *Id.,* at 1043. The trial court then summarized its decision to select "the most rigorous standard" in judging the challenged statutes by stating:

> In any event it would take a clearer signal from the Supreme Court than that in *Bellotti v. Baird* to demonstrate a retreat from the strict standard announced in *Roe v. Wade* and its progeny.

483 F. Supp. 1022 at 1043.

Once having adopted "the stiff no-interference-during-the-first-trimester standard" the trial court openly admitted that it would ignore "extensive evidence presented by the appellants on the subjects of (1) safety of first trimester abortions and (2) the lack of any true physician-patient relationship in the appellees' abortion clinics."[4] *Id.* at 1044.

The selection of the "strict scrutiny" standard by the trial court was of course the death knell for the statutes. First, the trial court admitted that it intentionally chose to disregard "extensive evidence" presented by the appellants regarding the long term consequences of first tri-

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4 In explaining its decision to ignore certain evidence presented by plaintiffs below, the court explained:

> I make no findings of fact with respect to the greatest part of this evidence; that is not appropriate, it would seem, until the Supreme Court is ready to overrule *Roe v. Wade* or at least substantially limit it. I only make those findings of fact necessary to appraise this legislation pursuant to current constitutional standards. In this respect, it cannot be overemphasized that the challenged legislation does not differentiate with respect to trimesters of pregnancy. Thus, all of the legislation must be judged according to the most rigorous standard—that reserved for legislation touching upon the first trimester of pregnancy.

mester abortions and the unsavory medical practices[5] of appellees' abortion clinics.[6] More importantly, and on no less than four occasions, the original trial court opinion states that the analysis of the challenged statutes required "the most exacting judicial scrutiny." *Womens Services, Inc. v. Thone, supra,* at 1042-1044, 1050.

Simply stated, the opinions below hold that any abortion regulation which affects the first trimester and carries a criminal penalty creates an "undue burden" because it is a "direct obstacle" to abortion.

We would respecfully submit to this Court that there is considerable confusion and conflict arising from this Court's initial statement in *Roe v. Wade* that: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (*Roe v. Wade,* 410 U. S. at 164) and language contained in subsequent decisions wherein state or federal laws regulating, directly or indirectly, the abortion decision making process have not been subjected to "strict scrutiny." *See, Bellotti v. Baird,* 428 U. S. 147 (parental notice); *Maher v. Roe,* 432 U. S. at 473 (public funding); *Planned Parenthood of Central Missouri v. Danforth,* 428 U. S. at 77-79 (informed consent); *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (E. D. Pa. 1975), aff'd 428 U. S. 901 (informed consent); *Harris v.*

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5 These practices included for example the absence of any counseling at one clinic and the administration, before counseling and the expression of informed consent, of valium to minors at the other clinic.

6 The Statement of Facts more fully discusses this evidence.

McRae, 65 L. Ed. 2d 784 at 804-5 (public funding) and of course *H. L. v. Matheson*, 450 U. S. 298, 303 (parental notification).

Plenary consideration will provide the opportunity for this Court to clearly identify the appropriate legal standard to be applied in judging the constitutionality of state laws regulating the performance of first trimester abortions and in particular the permissibility of statutes which attempt to enhance the giving of informed consent and provide for a waiting period in which information given to the abortion patient can be carefully considered. Absent such a ruling, there will be continuing conflict in the Circuit Courts and repeated attempts by the states to enact constitutionally permissible legislation.

Having obtained from this Court a judgment vacating and remanding the original judgment of the District Court, appellants were rightfully of the belief that a *clear signal* had been sent which called for a complete reconsideration with the application of a less demanding standard of review. The subsequent opinions of the district court (App. F) and 8th Circuit Court of Appeals (App. G) unequivocably reflect that this Court's reversal has been interpreted as applying only to the parental consultation issue.

A rational application of this Court's order of June 8, 1981 would indicate that a majority did not agree with the holding of the 8th Circuit that these challenged statutes directly interfere with "a woman's fundamental right to decide whether to terminate her pregnancy . . .", and are thus ". . . subject to strict scrutiny under the substantive due process analysis." *Womens Services, P. C. v. Thone*, 636 F. 2d 206 at 210.

CONCLUSION

Over four years ago, the Nebraska Legislature enacted statutes addressing the problem of abortions being performed at "abortion clinics." It sought to insure that patients visiting such clinics were carefully advised of the consequences of electing to have an abortion. The legislature further required a 48 hour waiting period to insure that following receipt of such information, the decision could be made outside the confines of the abortion clinic. The decision of the trial court clearly emphasized that the statutes were unconstitutional because they regulated first trimester abortions. That issue was taken to the United States Supreme Court and a reversal was obtained which strongly pointed to a definite relaxation of the Supreme Court's prior mandate in *Roe v. Wade,* supra, that the states were restricted from regulating first trimester abortions absent a compelling state interest. If a state can withhold funding for first trimester abortions, *Maher v. Roe,* 432 U. S. 464 (1977), and require parental notification of a minor seeking a first trimester abortion, *H. L. v. Matheson,* 450 U. S. 298 (1981), what possible rationale can restrict a state from insuring that those women who seek abortions during the first trimester have relevant medical information given to them and are provided with a reasonable period of time, outside of abortion clinics, to contemplate the abortion.

The impact of the issues raised herein are substantial. Failure to reverse the decision of the Eighth Circuit Court of Appeals will send a clear message to the courts now examining similar legislation and to state legislatures studying yet to be enacted statutes that the

states may not seek to protect women seeking first trimester abortions by attempting to insure that their decision is made knowingly and without undue pressure or influence of abortion profiteers.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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APPENDIX A

WOMENS SERVICES, P.C., a Nebraska Corporation, and G. William Orr, M. D.,

Plaintiffs,

vs.

Charles THONE, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Defendants.

WOMENS SERVICES, P.C., a Nebraska Professional Corporation, and G. William Orr, M. D.,

Plaintiff,

vs.

Charles THONE, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Defendants,

Marilyn A. Schneider,

Intervenor-Defendant.

LADIES CENTER, NEBRASKA, INC., a corporation; M. John Epp, M. D.; and Betty Roe, by her next friend, Barbara Gaither,

Plaintiffs,

Elizabeth F.,

Intervenor-Plaintiff,

vs.

Charles THONE, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Defendants,

Marilyn A. Schneider,

Intervenor-Defendant.

Nos. CV 78-L-289, CV 79-L-85
and CV 79-L-100.

United States District Court,
D. Nebraska.

Nov. 9, 1979.

MEMORANDUM OF DECISION

URBOM, Chief Judge.

On April 20, 1979, this court preliminarily enjoined several portions[1] of the Nebraska abortion law, Legislative Bill 316.[2] This opinion follows a full hearing on the merits; it speaks to the standing and religious freedom issues before addressing the specific sections in question.[3]

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1 Enjoined were §§ 28-326 (8), 28-327, 28-333, 28-334, and, insofar as it requires the reporting of "prescribed" abortions, 28-343.

2 The predecessor of L. B. 316, L. B. 38, contained sections marked 28-325 to 28-345. At a hearing on December 28, 1978, I preliminarily enjoined §§ 28-327 to 28-334, inclusive, 28-336, and 28-343 to 28-345, inclusive. The legislature responded by passing L. B. 316, which repealed many of the sections of L. B. 38 and enacted new sections in their place. Those sections substituted were 28-326, 28-327, 28-329, 28-330, 28-331, 28-333, 28-334, 28-342, 28-343, and 28-345. Several of the sections of L. B. 38 thus remain intact.

CV 78-L-289 challenged provisions of L. B. 38. Two actions, CV 79-L-85 and CV 79-L-100, were brought after the passage of L. B. 316 and challenged the remaining sections of L. B. 38, except § 28-335, and the sections of L. B. 316.

3 The scope of the three lawsuits in this case has been considerably narrowed since the entry of a preliminary injunction on the provisions of L. B. 316 listed in footnote 1. By an

(Continued on next page)

I.

STANDING OF LADIES CENTER, INC. AND BETTY ROE

The standing doctrine, as it limits the jurisdiction of federal courts, consists of "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U. S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975). The constitutional aspect, which presents the threshold and only standing question in this case,[4] stems from Article III of the Constitution of the United States, which restricts judicial power to "cases" and "controversies." This aspect of standing focuses on:

> ". . . whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction

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(Continued from previous page)

order dated July 6, 1979, the three lawsuits were consolidated and the repealed sections of L. B. 38 were removed from consideration. By an order dated August 1, 1979, the plaintiffs were granted partial summary judgment with respect to the parental consultation requirements only of § 28-333, and with respect to § 28-336. The order dated August 1, 1979, also granted the plaintiffs' motion for leave to amend, and the plaintiffs deleted their challenges to the constitutionality of §§ 28-329 to 28-332, inclusive.

4 The other aspect of standing concerns itself with "judicial self-goverance," whereby courts should avoid deciding "abstract questions of wide public significance" when other governmental institutions are more competent to address the questions and when judicial intervention is unnecessary to protect individual rights. *Warth v. Seldin*, 422 U. S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). This aspect functions to screen out litigants who, for example, have only a "generalized grievance" or who inappropriately seek to assert the interests of third parties. *Id.*, at 499, 95 S. Ct. 2197.

and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U. S. 186, 204 [82 S. Ct. 691, 703, 7 L. Ed. 2d 663] (1962). . . . A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . .' *Linda R. S. v. Richard D.*, 410 U. S. 614, 617 [93 S. Ct. 1146, 1148, 35 L. Ed. 2d 536] (1973). . . ."

Warth v. Seldin, 422 U. S. at 498-499, 95 S. Ct. at 2205.

A.

The plaintiff Ladies Center, Inc. is a Florida corporation authorized to do business in Nebraska. It provides facilities and support staff to physicians who perform abortions and other gynecological services on its premises. While Ladies Center does not employ the physician, who is an independent contractor, it does employ the members of the support staff. The "informed consent" currently obtained from patients, as well as other steps in the preparation of the patient for an abortion, is routinely carried out by Ladies Center employees.

By the order of April 20, 1979, the court certified a class of plaintiffs, consisting of all organizations which offer and provide facilities and a support staff to physicians who perform abortions. Ladies Center, the moving party, was designated class representative.

That Ladies Center satisfies the Article III dimension of standing is beyond serious dispute. It has a direct interest in how the court resolves the challenged statutory sections. As the physician who performs abortions faces potential criminal liability for failing to comply with

the disputed sections, Ladies Center faces potential criminal liability as a person[5] who aids, abets, or causes another to commit a crime. This potential criminal liability is of the same magnitude as that of the physician. § 28-206, R. R. S. Neb. (Cum. Supp. 1978). The physician, against whom the criminal statutes are aimed, clearly has standing. *Doe v. Bolton*, 410 U. S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973). Accomplice liability creates a similar "direct threat of personal detriment," see *id.*, and therefore gives rise to standing. *Baird v. Bellotti*, 393 F. Supp. 847, 851 (U. S. D. C. Mass. 1975), vacated and remanded on other grounds, *sub nom. Bellotti v. Baird*, 428 U. S. 132, 96 S. Ct. 2857, 49 L. Ed. 2d 844 (1976).

Because there is potential criminal liability, Ladies Center does not have standing problems of a nonconstitutional nature.[6] Its personal involvement is direct, specific, and concrete.

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5 Section 28-109 (16), R. R. S. Neb. (Cum. Supp. 1978), states that a "person" when relevant, shall mean a corporation.

6 Another ground for standing is conceivable. Ladies Center, Nebraska, Inc. is, in part, the subject of regulation by the challenged legislation which may work to deprive third parties—women seeking abortions and doctors seeking to provide abortions—of their constitutional rights. Other plaintiffs, somewhat similarly situated to Ladies Center, have been granted standing "as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U. S. 190, 192-197, 97 S. Ct. 451, 454-456, 50 L. Ed. 2d 397 (1976); *Eisenstadt v. Baird*, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

Because the ground of potential criminal liability is sufficient to bring standing to Ladies Center, it need not rely on cases involving *jus tertii* standing.

B.

At the time of the filing of her complaint Betty Roe alleged that she was pregnant and desired an abortion. Testimony at the trial indicates that although she was pregnant at the time of passage of Legislative Bill 316, March 22, 1979, she procured an abortion before the date on which L. B. 316 became operative, April 21, 1979.

By the order of April 20, 1979, this court certified on the motion of Betty Roe a class of plaintiffs, consisting of all patients desiring abortions. In addition, by the order of September 14, 1979, the court granted intervention on behalf of Elizabeth F. and certified again the class of pregnant women seeking an abortion in Nebraska.

The defendants contend that, because Betty Roe was not pregnant at the time the challenged legislation became operative, she could allege no more than speculative injury due to that legislation. Her status, they argue, cannot be distinguished from that of the Does in *Roe v. Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). The Supreme Court in *Roe v. Wade* denied standing to a married, childless couple, John and Mary Doe. Although Mrs. Doe had been advised by her doctor to avoid pregnancy, she was not pregnant at the time of the filing of her pleading. Their injury due to the Texas abortion statutes, thus, was too speculative to engender standing. The court said:

> ". . . Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place. . . . But we are not prepared to say that the bare allegation of

> so indirect an injury is sufficient to present an actual case or controversy. . . ."
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> *Id.*, at 128, 93 S. Ct. at 714.

The plaintiff Betty Roe argues that L. B. 316 became "effective" when Governor Thone signed it into law on March 22, 1979; thus, because she was pregnant at the time she filed her complaint, April 3, 1979, she was then faced with a threat of harm from the legislation. She contends that the emergency clause, § 15, caused the act to operate immediately after its passage. The plaintiff Roe also argues that if a pregnant woman does not have standing because an abortion law is not presently operating, then it is possible that she may never have standing to challenge that law, because it may be enjoined before it becomes operative.

Section 15 of L. B. 316 provides:

> "Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law."

Section 12 of that bill states that the "act shall become operative thirty days after its effective date."

While the act may be deemed, as a matter of semantics, "effective" after its passage due to the terminology of § 15, the dictates of the act do not impinge upon anyone until the statute becomes operative. A plain reading of § 12 and the bill as a whole clearly indicates that the act was not to operate until thirty days had passed after its approval.

Betty Roe contends that the thirty-day hiatus before operation of the statute was to permit the institution of

lawsuits challenging the law. Although this may have been so, there is nothing in the language of the act or in its legislative history to indicate that the legislature intended to create standing on behalf of those who would not otherwise have standing. Certain persons—for example, physicians desiring to perform abortions—already unquestionably possessed standing to challenge the act. The inference, then, if the legislature intended to permit legal action during the thirty-day period, is that it intended to allow those with standing to challenge the act. Nothing would lead one to believe that the legislature intended to create a personal interest in that action on behalf of women who would not be pregnant at the time of the act's operative date.

To obtain standing the plaintiff must allege a personal stake in the outcome of the controversy sufficient to warrant exercise of the court's remedial powers on her behalf. *Warth v. Seldin,* 422 U. S. at 498, 95 S. Ct. 2197. The time at which the plaintiff must possess that personal interest is at the filing of the complaint. Once the plaintiff has standing, the question of the effect of a change in circumstances goes to mootness.

The crucial date at which the provisions of the act create a personal stake on behalf of its proposed subjects is the date the act becomes operative, not the date of its passage. Only when the act operates—i. e., has the capacity to be enforced—does it intrude upon the decision-making process of those affected by it. For one to have a personal stake in a challenge to an act, one must be currently affected, in the position of being imminently affected, or, certain to be affected in the future by the

act; otherwise, the act simply does not bear on that individual.

Because Betty Roe was not affected or in threat of being affected by L. B. 316 at the time she filed her lawsuit, she did not have standing. Although she was pregnant, there was no way the abortion law could interfere with her plans to terminate that pregnancy. She suffered neither injury nor threat of injury due to the challenged law. At the time she filed her complaint this was apparent.[7]

The situation in the present case is different from other cases where the pregnant woman has been granted standing. For example, in *Roe v. Wade, supra,* the abortion law was in effect at the time the pregnant woman challenged it; in *Baird v. Bellotti, supra,* at 850-851 and n. 6, the pregnant woman brought suit shortly before the effective date of the statute. The *Baird* court noted that "the statute . . . would prevent her . . . from obtaining an abortion without compliance with its terms." 393 F. Supp. at 851. Standing was created by the fact that the statute's imminent operation would have burdened her exercise of her rights. The issuance of an injunction did not nullify that standing; if anything, that action would go to mootness.[8] The case at bar differs significantly from *Baird.*

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7 At the time Betty Roe filed her complaint there remained three weeks before L. B. 316 was scheduled to become operative. She desired an abortion at the time she filed her complaint. The court received no evidence which would indicate that three weeks is an insufficient time in which to procure an abortion under the then-existing laws of Nebraska.

8 For purposes of mootness, pregnancy is treated differently from some other conditions. The same considerations sup-

(Continued on next page)

II.

RELIGIOUS FREEDOM

The First Amendment to the Constitution of the United States forbids the state[9] to make any law "respecting an establishment of religion, or prohibiting the free exercise thereof." The plaintiffs contend that the legislation in question violates both the Establishment Clause and the Free Exercise Clause.

A.

Legislation challenged under the Establishment Clause may survive constitutional scrutiny only where it satisfies a three-part test. It:

> ". . . first, must reflect a clearly secular legislative purpose, . . . second must have a primary effect that

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(Continued from previous page)

porting that different treatment, however, do not apply with respect to standing. The time-consuming aspects of trial and the appellate process affect the feasibility of maintaining a live controversy throughout the process. See, e. g., *Doe v. Poelker*, 497 F. 2d 1063, 1067 (C. A. 8th Cir. 1974). The time-consuming dimension of the judicial process does not affect the establishment of standing at the moment of the filing of the complaint; standing must exist at that one point. Afterward, considerations of mootness, with its special allowance for pregnancy, control.

9 The First Amendment specifically enjoins action by Congress. Through the Due Process Clause of the Fourteenth Amendment, the First Amendment has been applied to the states. See e. g., *Everson v. Board of Education*, 330 U. S. 1, 8, 67 S. Ct. 504, 91 L. Ed. 711 (1947); *Pierce v. Society of Sisters*, 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

> neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion . . . "
>
> *Committee for Public Education v. Nyquist*, 413 U. S. 756, 773, 93 S. Ct. 2955, 2965, 37 L. Ed. 2d 948 (1973).

The plaintiffs attack the current Nebraska abortion legislation on each part of the test.

1. *Purpose*

The plaintiffs assert that the legislation under examination has no clearly secular purpose. They maintain that at the heart of the legislation is the belief that life begins at conception. Because this belief is a religious belief, the plaintiffs argue, this legislation fails to embody a clearly secular purpose.

The following elements must be established before the court can adopt the plaintiffs' position: a. that the idea that life begins at conception was a motivating principle of the legislation; b. that the conviction that life begins at conception can be a "religious" belief for purposes of the Establishment Clause and was a motivating principle for this legislation in its capacity as a "religious" belief; and c. that there is no purpose for this legislation, the protection of fetal life aside, which amounts to a clearly secular purpose.

a.

The first element has clearly been established. At trial the defendants through their counsel affirmed the following statement, taken from page 3 of their brief dated April 6, 1979:

> "Defendants admit without qualification that the statutes in question were enacted and will be enforced in the interest of unborn children from the moment of conception. We do so based on the strong and legitimate right of the state's interest in the fetus. *Maher v. Roe*, 432 U. S. 464, 478[, 97 S. Ct. 2376, 53 L. Ed. 2d 484] n. 11 (1977)."

Moreover, the legislature openly proclaims its intent to protect fetal life. The intact declaration of purpose for L. B. 38, the predecessor of L. B. 316, reads as follows:

> "28-325. Abortion; declaration of purpose. The Legislature hereby finds and declares:
>
> (1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;"

b.

The second element presents a difficult conceptual issue. It must be determined whether the tenet that life begins at conception constitutes a religious belief within the context of the Establishment Clause. The issue is one which cannot be taken lightly, because, on the one hand, it has the potential to involve deeply meaningful personal rights, and on the other hand, its determination could remove vast areas of human conduct from the legislative domain.

This segment of the opinion first discusses general considerations touching the definition of religious belief.

It then addresses the bearing of testimony on the issue. Next, it considers several of the plaintiffs' proffered positions. Finally, it evaluates the life-at-conception principle within the parameters of religious belief, both theistic and nontheistic, established in the first subsection.

i.

Delimiting the expanse of religious belief for First Amendment purposes—either Free Exercise or Establishment—[10] may not be done by resort to a solitary standard. Neither the Constitution nor the Supreme Court has defined religion in this context, and Supreme Court decisions have trod a tortuous path. *E. g., Walz v. Tax Commission,* 297 U. S. 664, 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). Modern decisions do indicate, however, that the Religion Clauses contemplate both theistic and nontheistic religious beliefs. See *Torcaso v. Watkins,* 367 U. S. 488, 495, 81 S. Ct. 1680, 6 L. Ed. 2d 982 and n. 11

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10 Although some commentators feel that the definition of religion must differ as between its use in the Establishment Clause and its use in the Free Exercise Clause, see, e. g., § 14-6, *American Constitutional Law,* (L. Tribe, 1978), this sentiment is not convincing. See *Everson v. Board of Education,* 330 U. S. 1, 32-33, 67 S. Ct. 504, 91 L. Ed. 711 (1947) (Rutledge, J., dissenting); *Malnak v. Yogi,* 440 F. Supp. 1284, 1316, n. 20 (U. S. D. C. N. J. 1977); Merel, "The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment," 45 U. Chi. L. Rev. 805, 829, n. 128, and accompanying text (1978).

As justice Rutledge notes in *Everson v. Board of Education,* the Constitution employs the word "religion" only once for both clauses. Both the principle of statutory construction and the absence of any Framers' intent to the contrary point toward a single definition of religion in the First Amendment. Discussion regarding the definition of religion proceeds from this basis.

(1961); see, generally, *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 and n. 6 (1972), citing *Welsh v. United States*, 398 U.S. 333, 357, n. 8, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970) (Harlan, J., concurring); *McGowan v. Maryland*, 366 U.S. 420, 465-466, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961) (Frankfurter, J., concurring). It is instructive to consider these two poles of religious belief individually.

The traditionally dominant constitutional view of religious belief has dealt with man's relationship to a Supreme Being. This was the posture of the Framers. See, e.g., Jefferson, "An Act for Establishing Religious Freedom" and "Notes on Virginia;" Madison, "A Memorial and Remonstrance on the Religious Rights of Man," in *Cornerstones of Religious Freedom in America* (J. Blau, 1949). It was also the theme in Supreme Court decisions until relatively recent times. E.g., see *Davis v. Beason*, 133 U.S. 333, 342, 10 S. Ct. 299, 33 L. Ed. 637 (1890) (religion encompasses one's relationships with his Creator and the concomitant obligations of reverance and obedience to His will); *United States v. Macintosh*, 283 U.S. 605, 633-634, 51 S. Ct. 570, 75 L. Ed. 1302 (1931) (Hughes, C. J., dissenting), overruled, *Girouard v. United States*, 328 U.S. 61, 66 S. Ct. 826, 90 L. Ed. 1084 (1946).

Most major modern decisions, moreover, have dealt with theistic religious beliefs. See, e.g., *Constitutional Law*, Ch. 14 (G. Gunther, 9th ed. 1975). Because the presence of religious activity was not an issue in those cases, none of them effectively offers more than a factual situation to indicate one set of coordinates in the religious plane. That religious plane includes, for example, recita-

tion of a prayer to a Supreme Being, *Engel v. Vitale,* 370 U. S. 421, 82 S. Ct. 1261, 86 L. Ed. 2d 601 (1962); the reading of Bible verses, *Abington School District v. Schempp,* 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); affirmation of belief in a Supreme Being, *Torcaso v. Watkins,* supra; and the teaching of divine creation, *Epperson v. Arkansas,* 393 U. S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968). From these examples, it may be extracted that a theistic religious belief for First Amendment purposes is one that is attributable to or based upon the will of God. See *Davis v. Beason,* 133 U. S. at 342, 10 S. Ct. 299.

Before discussing nontheistic religious belief, I note that the plaintiffs' evidence regarding religious freedom consisted primarily of testimony of experts in the field of theistic religious beliefs. Their Establishment argument pivots largely on the position of the Roman Catholic Church regarding the life-at-conception principle, and, to a lesser extent, the positions of other churches which are based on a belief in God and obedience to His will. Their Establishment argument thus is made on the assertion that the motivating purpose for this legislation was a *theistic* religious belief. Both theistic and nontheistic religious belief bases, however, should be explored.

The Supreme Court has done little to map out the terrain of nontheistic religious belief. In its one major excursion to date, *Torasco v. Watkins,* supra, the court struck down a provision of the Maryland Constitution which required appointees to state offices to declare their belief in the existence of God as a condition of obtaining their commissions. This provision had operated to deny

a Secular Humanist, who had refused to declare a belief in God, an appointment as a public notary. The court stated:

> ". . . [N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."
>
> 367 U. S. at 495, 81 S. Ct. at 1683-1684.

The court in a footnote in that case listed several nontheistic religions:

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. . . ."
>
> 367 U. S. at 495, n. 11, 81 S. Ct. at 1684, n. 11.

A nontheistic belief which qualifies as religious in the First Amendment sense is one limited at least to a belief of an adherent to an organized, nontheistic group. Whatever else nontheistic religion is, it has at least two essential qualities: *tenets* and *organization*. Three reasons support the foregoing conclusion.

First, this is the boundary presently staked out by the court in *Torcaso*.

Second, the expansion of nontheistic religious belief to one of mere "personal conscience," rather than adherence to an organized group, would put the trial court in a position of evaluating a complainant's constitutional rights based on its impression of his sincerity or credibil-

ity. This obviously presents a great possibility of dissimilar treatment of similarly situated complainants. Furthermore, it might devolve to the elitist end of protecting the constitutional rights of the articulate more than those of the inarticulate. Carried to its logical conclusion, such a standard would either be meaningless or result in artificial and arbitrary distinctions.

Third, an expansion of nontheistic religious belief beyond the above-articulated standard would go beyond the path charted by the Supreme Court in *Wisconsin v. Yoder*, supra:

> "... [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. *Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religious Clauses.*" (Emphasis added.)
>
> 406 U. S. at 215-216, 92 S. Ct. at 1533.

A standard less than that articulated above would degenerate into a question of personal preference, even if it were deeply felt. This *Yoder* clearly speaks against.

From the foregoing discussion of non-theistic religious belief as related to the First Amendment, it follows that the Supreme Court's broad reading of religious belief when interpreting modern congressional draft laws found in *United States v. Seeger,* 380 U. S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965), and *Welsh v. United States,* 398 U. S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970), does not apply to its reading of religious belief in the context of the First Amendment. See, also, *Malnak v. Yogi,* 440 F. Supp. 1284, 1314 (U. S. D. C. N. J. 1977) (discussing why the majority-opinions in *Seeger* and *Welsh* are not significant with respect to the definition of religious belief for purposes of the First Amendment Clauses). The Supreme Court has studiously framed the conscientious objector issue narrowly as one of stautory, rather than constitutional, construction. *E.g., United States v. Seeger,* 380 U. S. at 174, 90 S. Ct. 1792.

ii.

The court received conflicting testimony during trial about the idea that life begins at conception is a religious idea. This specific question, however, is not one to be resolved on the basis of burden of proof or credibility of witnesses; it is a question of law for the court to decide. *Malnak v. Yogi,* 440 F. Supp. at 1303-1304. Otherwise, the concept of a religious belief could fluctuate from case to case, and similar or identical beliefs could be either religious or not religious, depending solely on differences of testimony elicited and perceptions of the trier of fact. See *id.,* at 1318.

Moreover, other implications of allowing religious leaders to determine which beliefs are "religious" cut

against the grain of the First Amendment. Differing religious denominations take different positions on the subject with different references to and different interpretations of scriptures. The mere fact that religious groups disagree or quote the Bible to support public positions or take political action to further their positions, however, will not transform a controversy into a dispute among "religious" beliefs of the type of which the Establishment Clause curtails resolution in the political arena. If this were not the case, state regulations concerning areas such as intoxicating beverages, homosexuality, obscenity, and even marriage and divorce, would be beyond state regulation. As the Supreme Court through Mr. Chief Justice Burger said:

> "Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement."
>
> *Walz v. Tax Comission,* 397 U. S. 664, 670, 90 S. Ct. 1409, 1412, 25 L. Ed. 2d 697 (1970).

The testimony concerning the scope of "religious" belief has value, but only to provide a background for determination of the legal issue.

iii.

The plaintiffs suggest that, where societal rules are based upon principles which coincide with dictates of faith, these rules may be considered secular, if they are "accepted

by overwhelming social consensus and serve predominately secular ends." See Plaintiffs' Mid-Trial Brief, p. 44. Such a standard, however, would be circular as well as inappropriate for consideration of purpose, because it focuses more on effect than purpose. Furthermore, the rationale of such a standard is not supported by prior decisions. The plaintiffs also hint at a standard[11] which contemplates the individual's "rights of conscience," *id.*, but this, too, is not appropriate. See *Wisconsin v. Yoder*, 406 U. S. 205, 215-216, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).[12]

Another line of argument employed by the plaintiffs amounts to the following: There is a difference of opinion over when life begins. Science cannot tell us when life begins. Some theologians say that this issue is a "religious" one. Therefore, the belief that life begins at conception is a religious belief.

This argument is not persuasive. It is supported neither by case law nor by reason. Merely because science cannot answer a question does not mean that that question is thrown into the realm of religion for purposes of the Establishment Clause, and this holds true even if theo-

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11 The plaintiffs would derive this standard from the concurring opinion of Mr. Justice Brennan in *Abington School District v. Schempp*, 374 U. S. 203, 231, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

12 The word religion imports the same meaning for both clauses in the First Amendment. See footnote 10 above. Discussion in the *Yoder* case, a Free Exercise case, regarding the definition of religion or religious belief is therefore applicable to this discussion involving the Establishment Clause.

logians label the question religious. There are many questions that science cannot answer, because the scientific method neither makes value judgments nor provides underlying definitions to which scientific evidence may be directed. Thus, scientists working within different definitional frameworks may come to different conclusions, when they apply their scientific expertise. Until a particular definition of what constitutes human life has been adopted, the scientist has no framework within which to determine when human life begins. The plaintiffs argue that the definitional question is by necessity one of a religious nature, [13] but this is not so. Not all or even most value judgments or definitions must be considered religious matters, but may be, in the words of Mr. Chief Justice Burger in the *Yoder* case, "philosophical and personal."

The judgment as to what precise set of factors amounts to human life is a matter of individual judgment. For some persons it springs from a belief in a Supreme Being; for others, perhaps from a tenet of a montheistic religion, and for still others, from philosophical considerations unrelated to a Supreme Being or a tenet of a nontheistic religion. One's judgment on the matter could arise from a combination of these determinants.

So long as a legislature bases its determination as to what factors comprise human life on considerations which

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13 The plaintiffs suggest that the traditional criteria used to determine whether a belief is "religious" is where it is (1) the official belief of a religious institution, and (2) not shared by society as a whole. Post-Trial Brief of Betty Roe, p. 13. To show that this standard is unrealistically broad does not require much attention. Areas such as marriage, divorce, and consumption of alcoholic beverages are examples of areas which would be covered by such a definition. Clearly, the Establishment Clause is not meant to reach that far.

are as capable of being labeled philosophical as religious, the Constitution does not require that the chosen set of factors be called religious or that a different set of factors be chosen.

IV.

For purposes of this case, it will not be necessary to define religious belief further or distinguish it further from philosophical conclusion and the scientific method. The assertion of the Nebraska legislature that life begins at conception may have come from impulses of a philosophical or religious nature or one of the other mixed with scientific data.[14] The evidence before the court does

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14 One scientist testified that at conception an embryo has its own individual genetic code to direct its existence and development, that a fetus is anatomically, physiologically, and in its destiny separate from its mother and that the fetus depends upon its mother only for nourishment and oxygen.

A different scientist, on the other hand, testified that life is a continuum, that both the sperm and the ovum are genetically distinct from its producers [albeit, each only contains half a genetic code necessary to direct human development], and that there is no scientific reason to assign special significance to the moment of conception.

One expert testified that from a religious viewpoint some persons consider the beginning of life to be at conception because the embryo then is calling for a soul and the soul is soon after embodied.

Another expert in religion considered the choosing of some particular moment in the process of creating life to be a value judgment and suggested that value judgments are the prerogative of religion.

There is no constitutional reason to compel a state legislature not to pick the evidence provided by the first scientist as a basis for its decision about the beginning of life. That decision would rest on a philosophical definition of life and scientific evidence to establish what is the likely result of the physical attainment of a set of factors matching that philosophical definition.

not establish that religious considerations—theistic or nontheistic—were a significant motivating force in the passage of the legislation.[15]

The face of the legislation does not suggest a purpose of carrying out either obligations to or the will of a Supreme Being. It does not declare a purpose of adhering to a tenet of a nontheistic religion. Neither does the legislative history. In fact, the contents of the record are consistent with the philosophical side of the life-at-conception principle. Thus analyzed, the legislation reflects a clearly secular purpose within the meaning of the *Nyquist* case, supra.

The legislative record does reveal numerous references to the Catholic Church, one characterization of the subject by a senator as a "church issue," and the characterization by the bill's chief sponsor as embracing the "pro-life philosphy." Nevertheless, the record does not, to the court's knowledge, contain statements by the bill's chief sponsor or any supporting legislator which affirm or assign significance to a belief that this legislation should be passed to bring the law into closer conformity with the

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15 A precise standard of review need not be delineated. It is enough to note a threshold beneath which motivation by a concept as a religious belief could not possibly corrupt a piece of legislation. Such a threshold would be where the concept in its capacity as a religious belief comprises a significant factor in the legislative purpose.

One recent district court decision asserts that legislation passes the purpose test unless it is motivated by a belief that is clearly and singularly religious. *Akron Center for Reproductive Health v. City of Akron*, No. C78-155A (unreported opinion U. S. D. C. N. D. Ohio, August 22, 1979, pp. 22-23). I do not adopt this test, however.

will or design of God or a nontheistic religious principle. The First Amendment does not invalidate legislation because church groups lobbied for it, thereby creating a "church issue." See *Walz v. Tax Commission*, 397 U. S. at 670, 90 S. Ct. 1409.

c

While the third element to the plaintiffs' position need not be addressed, it should be considered, because such a consideration will show an unquestionably secular purpose for the legislation.

The obvious secular purpose at issue here is that of maternal health. That the legislature was concerned with maternal health is apparent. Subsections 4 and 5 of the intact declaration of purpose for L. B. 38, the predecessor of L. B. 316, say:

> "(4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life; and
>
> "(5) That it is in the interest of the people of the State of Nebraska to maintain accurate statistical data to aid in providing proper maternal health regulations and education."

Furthermore, the legislative history and a reading of the legislation itself lead to the conclusion that one concern, even though not the dominant one, was that of the pregnant woman's physical and mental well being.

The plaintiffs argue that the legislature's expressed concern for maternal health is not genuine. They maintain that a legislative act genuinely concerned with ma-

ternal health would impose no restrictions on a woman's access to an abortion. These arguments are not persuasive. It is not out of the range of reason for one to think that some regulations on abortion would promote either the mental or physical health of the pregnant woman. The regulations may be unconstitutional, but not because the legislature was irrational or insincere. Also, matters such as "true" legislative intent are too speculative on the facts of this case to compel the disregarding of an apparent legislative purpose. See, also, *Akron Center for Reproductive Health v. City of Akron*, No. C78—155A (unreported opinion U. S. D. C. N. D. Ohio, August 22, 1979, pp. 24-35).

One point should be made about the purpose test in general. The plaintiffs have made extensive arguments along this line and have relied on many cases which do not directly confront problems inherent in putting legislative purpose in this context under the microscope. The Supreme Court has understandably decided the vast majority of its Establishment Clause cases under either the effect test or the entanglement test. Some commentators have asserted that "the primary goal of the Establishment Clause is to protect freedom of choice—to bar the government from doing that which has the potential for inducing religious belief." Note, "Transcendental Meditation and the Meaning of Religion Under the Establishment Clause," 62 Minn. L. Rev. 887, 896 (1978). The primary focus, then, normally would be the effect rather than the purpose of legislation.

2. *Effect*

A law violates the Establishment Clause if its "primary effect" either advances or inhibits religion. The plaintiffs assert that this test is met where it is shown that a law's religious effect is more than remote, indirect, or incidental. This is inaccurate. Although the Supreme Court has characterized the effect of a permissible law as "remote and incidental" in its advantage to religious institutions, it has characterized the effect of an impermissible law as "direct and immediate" with respect to advancing religion. *Committee for Public Education v. Nyquist,* 413 U. S. at 783, 93 S. Ct. 2955, n. 39; see, e. g., *Meek v. Pittinger,* 421 U. S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975). This case does not require either an articulation of a precise standard or a characterization of this law's effect as either "direct and immediate" or somewhere in the middle. The challenged legislation here clearly has no more than a "remote and incidental" effect, if any at all, of advancing or inhibiting religion.

That the law would neither advance nor inhibit religion in more than a remote and incidental way follows from the above discussion of religion as differentiated from science and philosophy. The law regulates a woman's access to abortion, specifically in its dominant provisions, by requiring that she receive certain information and wait forty-eight hours from the time she receives that information before she may obtain an abortion. Here, neither the information nor the delay—the essence of the law—conveys any message to the woman that is necessarily religious in its nature. Moreover, if a woman somehow receives the impression that this is a requirement on

behalf of the state to do what it can to preserve fetal life, then it still may be said that this is not a religious message. There still has been no communication regarding God's will or any reason for the woman to think that the state seeks to implement God's design, the tenet of any religion respecting God's design, or the tenet of any nontheistic religion. For all she knows, the state acts from a philosophical or scientific viewpoint. See *Malnak v. Yogi*, 440 F. Supp. at 1316-1317, n. 20 (principles which happen to coincide with "the dogmas of many religious sects" are not necessarily religious; they become religious, however, if "taught as . . . divine law.").

As stated earlier, the Establishment Clause "should bar the government from doing that which has the potential for inducing religious belief." Note, 62 Minn. L. Rev. at 896. It would stretch the imagination to see how the requirements of this legislation could either induce or inhibit a certain religious belief or religion in general. This case bears no resemblance, for example, to *School District of Abington Township v. Schempp*, 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963), where state law and practice required Bible reading sessions in the public schools. The state here does not endorse, either explicitly or implicitly, one "religious" viewpoint or religion in general, and the legislation would not have the tendency of causing someone to avoid, adopt, or abandon "religious" beliefs.

3. *Entanglement*

". . . [F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and ac-

tive involvement of the sovereign in religious activity. . . ." *Walz v. Tax Commission*, 397 U. S. at 668, 90 S. Ct. at 1411.

The Supreme Court has set out factors germane to the analysis of sponsorship, support and involvement:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. . . ."
>
> *Lemon v. Kurtzman*, 403 U. S. 602, 615, 91 S. Ct. 2105, 2112, 29 L. Ed. 2d 745 (1971)

Legislation which requires "official and continuing surveillance" of a religious institution suggests an "impermissible degree of entanglement." *Walz v. Tax Commission*, 397 U. S. at 675, 90 S. Ct. at 1414.

The legislation in this case shows no sign of entanglement problems. There is no government sponsorship or financial support of religious activity. The government is not actively involved in religious activity. The government has neither aided religious institutions nor engendered a need for surveillance of those institutions.

The plaintiffs' main argument with respect to the entanglement test is that when a state takes a position on abortion it invites political struggles based along lines of religion. The potential for political divisiveness is indeed a relevant factor in some circumstances for entanglement considerations. *Lemon v. Kurtzman*, 403 U. S. at 622, 91 S. Ct. 2105. But it is only a factor, as in the *Lemon* case, where the political divisiveness is sparked and continually fueled by the government regulation and periodic

review of religious institutions. In the case at bar the political divisiveness arises not from a desire to influence annual state appropriations which benefit certain religious institutions, as in *Lemon*, but from a desire with an origin independent of state regulation. Political divisiveness along lines of religion alone would not be sufficient to remove an area from the legislative domain on the grounds of the Establishment Clause. Otherwise, many areas, such as divorce, would be removed from the legislative domain which have been in it since before our nation's birth.

B.

The state may not interfere with the practice of a legitimate religious belief unless it is necessary to do so in order to serve an interest "of the highest order." *Wisconsin v. Yoder*, 406 U. S. at 214-215, 92 S. Ct. 1526; *Sherbert v. Verner*, 374 U. S. 398, 403-406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *Braunfeld v. Brown*, 366 U. S. 599, 606-607, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961). To qualify for protection under the Free Exercise Clause, a belief and practice may not be "merely a matter of personal preference," but must be "one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Wisconsin v. Yoder*, 406 U. S. at 216, 92 S. Ct. at 1533. In addition, the practice must "stem from" one's faith, and be "fundamental to" that faith. *Id; Teterud v. Burns*, 522 F. 2d 357, 360 (C. A. 8th Cir. 1975) (the practice must be "deeply rooted in religious belief"); *People v. Woody*, 61 Cal. 2d 716, 720, 40 Cal. Rptr. 69, 73, 394 P. 2d 813, 817 (1964) (protection provided where the practice played a "central role" in the practitioner's religion).

Examination of the legal standard clearly shows that the plaintiffs may not invoke the protection afforded by the Free Exercise Clause. The plaintiffs have presented no evidence to indicate that a woman's obtaining of an abortion without the regulation imposed by this legislation would constitute a fundamental tenet of any religion. Therefore, the challenged regulation could not interfere with the practice of a fundamental religious tenet.

The plaintiffs presented testimony by various religious leaders to the effect that a woman's decision to abort or to bear a child was a deeply personal and important decision, one that could be considered religious. One witness indicated that under some circumstances the decision to abort would be a moral necessity and agreed that it could be described as a religious duty.

The testimony elicited defeats any free exercise claims. The fact that the decision is one to be made by the individual woman, and the fact that the decision—and thereby practice—will vary only on the ingredients of each woman's situation, indicate that the matter is one of "personal preference" rather than the practice of an organized religion. The fact that the abortion decision may be counseled by a clergyman does not change this aspect. Even accepting, for purposes of argument, that *abortion* could be considered for some a "religious duty," that does not make *abortion without state regulation* a religious duty. See, generally, *Braunfeld v. Brown*, supra. Furthermore, the fact that procuring an abortion may be a religious duty for some, but not for others, who are pregnant indicates that unfettered abortion does not constitute a religious "tenet," much less a "fundamental" tenet of any religion.

In any event, as indicated earlier, the mere labeling of something as coming within a "religious" area by theologians does not serve to make that area "religious" for purposes of invoking First Amendment protections.

III.

FOURTEENTH AMENDMENT

From the filing of the complaints in these actions to the time of trial, the scope of the action has been considerably narrowed.[16] The remaining challenges to the abortion legislation, as crafted at the pretrial conference,[17] question aspects of the record-keeping, informed-consent, and waiting-period provisions. These provisions will be addressed seriatim, after a brief discussion of the applicable standards of review.

Before addressing the merits of the sections in question I note that the court received much evidence about the operation of abortion clinics and the health risks of abortion vis-a-vis those of childbirth. The defendants have presented much of this evidence to create an appellate record for the purpose of seeking to change the standard of review regarding abortion. In deciding the issues now before the court, however, I make only those few findings of fact necessary to determine the constitutional status of

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16 See footnote 3, supra.

17 Several sections have been challenged in the three actions which were not brought up at the pretrial conference. As the challenge to these sections has apparently been abandoned, I rule the following sections constitutional: §§ 28-335, 28-325, 28-342, and 28-345.

the challenged provisions under the present standard of review.

A.

The plaintiffs claim that all or part of the challenged provisions unduly burden a woman's right to terminate her pregnancy, are void for vagueness, and violate the Equal Protection Clause. It is sufficient to set out briefly the standards of review at this point and develop them later as necessary.

1. *Procedural Due Process*

The standard governing consideration of a void-for-vagueness challenge was stated in *Colautti v. Franklin,* 439 U. S. 379, 390, 99 S. Ct. 675, 683, 58 L. Ed. 2d 596 (1979), as follows:

> ". . . [A] criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' . . . or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions,' . . . is void for vagueness. . . ."

2. *Equal Protection*

In raising the equal protection claims the plaintiffs apparently seek to trigger strict scrutiny based on the following dicta of the Supreme Court of the United States in *San Antonio School District v. Rodriguez,* 411 U. S. 1, 17, 93 S. Ct. 1278, 1288, 36 L. Ed. 2d 16 (1973):

> ". . . We must decide, first whether the [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legis-

> lation] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."

Strict scrutiny would nullify any legislative classification impinging on a fundamental right, if that classification were not narrowly drawn to further some compelling state interest. See, e.g., *Shapiro v. Thompson,* 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969). The appropriate standard of review, however, is not that of strict scrutiny. The Supreme Court has addressed the *San Antonio School District v. Rodriguez* case in abortion context and has indicated that the rational relationship test would apply where a regulation on abortion differed from regulations on other medical procedures in general. *Maher v. Roe,* 432 U. S. 464, 470-471, 473, 478, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977). Furthermore, the court has specifically applied the rational relationship test when adjudicating the constitutionality of a restriction placed on abortion but not placed on other surgery. *Doe v. Bolton,* 410 U. S. 179, 194, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973); see, also, *Carey v. Population Services International,* 431 U. S. 678, 696, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (Brennan, J., delivering the judgment of the court on this aspect). Finally, the Supreme Court has made it clear that certain restrictions or regulations may be imposed on abortion (and not imposed on other types of surgery) without labeling the underlying state interests involved fundamental. E. g., *Planned Parenthood of Missouri v. Danforth,* 428 U. S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976) (record-keeping and reporting); *Bellotti v. Baird,* — U. S. —, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (requirement of a minor, under certain circum-

stances, to consult with or obtain consent from her parents). Moreover, the policy underlying the application of strict scrutiny under equal protection analysis to certain "fundamental" rights—to ensure effectively equal access to the criminal process, the political process, and education, see, e.g., "Developments," 82 Harv. L. Rev. 1065, 1192 (1969); *Constitutional Law*, 657-665, 689-874 (G. Gunther, 9th ed. 1975)—does not equally apply to legislative enactments regarding abortion. See, generally, *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627-628, 89 S.Ct. 1886, 23 L.Ed. 2d 583 (1969) (the rational relationship test is based on the assumption that the political process functions effectively to represent the public; strict scrutiny must be applied when the challenge is to this basic assumption underlying the presumptive validity of legislation). The Supreme Court has implied that this is the case. See, generally, *Maher v. Roe*, supra. The upshot is that a fundamental right for purposes of due process analysis is not necessarily a fundamental right for purposes of equal protection analysis. See *Maher v. Roe*, 438 U.S. at 471-478, 97 S.Ct. 2376. The applicable standard of review regarding classifications made between abortion and nonabortion surgery is whether the classifications in question are rationally related to a legitimate state interest.

One incidental point should be made at this juncture. Although the state's interest in the potential life of the fetus is not compelling prior to viability, it is legitimate, Compare *Roe v. Wade*, 410 U.S. at 154, 93 S.Ct. 705, with *Maher v. Roe*, 432 U.S. at 478, 97 S.Ct. 2376, n. 11.

3. *Substantive Due Process*

Turning to the due process standard which protects the pregnant woman's privacy rights, there need not be much

said in addition to that stated in the April 20, 1979, memorandum granting a preliminary injunction, which was essentially as follows:

> ". . . The right of woman to choose without unduly burdensome interference whether to terminate her pregnancy is fundamental;
>
> ". . . The permissible degree of interference in that decision by the state depends upon the severity of the technique used by the state and the nature of the state's interest, which interest grows with the duration of the pregnancy;
>
> ". . . A state may not impose any direct obstacles—such as criminal penalties—to further its interest in the potential life of a fetus before viability; and
>
> ". . . A state has no compelling interest in the potential life of the fetus prior to the fetus' viability.
>
> "Two additional cases need to be mentioned: *Planned Parenthood of Missouri v. Danforth,* 428 U. S. 521[, 96 S. Ct. 2831, 49 L. Ed. 2d 788] (1976), and *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (U. S. D. C. E. D. Pa. 1975), affirmed sub nom. *Franklin v. Fitzpatrick,* 428 U. S. 901[, 96 S. Ct. 3202, 49 L. Ed. 2d 1205] (1976). In *Danforth,* the statute provided criminal sanctions for performing an abortion during the first twelve weeks of pregnancy without a certification by the woman that she consented to the procedure and 'that her consent is informed and freely given and is not the result of coercion.' That part of the statute was held constitutional. The rationale of the three-judge district court was that the provision ensures that the woman retains control over the discretions of her consulting physician and that the provision was 'not burdensome or chilling,' manifesting a legitimate interest of the state 'that this important decision has in fact been made by the person constitutionally empowered to do so, and did not interpose 'the state or third parties in the decisionmaking

process.' The Supreme Court said that it did 'not disagree with the result reached by the District Court' and explained:

> 'The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

"In *Fitzpatrick*, the three-judge district court approved an informed consent provision, which was buttressed by criminal sanctions, requiring the physician or a counselor to advise the pregnant woman (a) that there may be detrimental physical and psychological effects which are not foreseeable, (b) of possible alternatives to abortion, including childbirth and adoption, and (c) of the medical procedures to be used. The decision of that court was affirmed without opinion, the Supreme Court simply citing *Danforth*. The significance of *Fitzpatrick* is open to question because of the Supreme Court's failure to write an opinion and the observation of that court in *Danforth* in footnote 8 that:

> 'The appellants' vagueness argument centers on the word "informed." One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who composed the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician to an undesirable and uncomfortable straitjacket in the practice of his profession.'

> ". . . [T]he segments of the Nebraska statute under attack here do impose criminal penalties for violation and do apply before viability of the fetus . . . The requirement[s of the Nebraska statute are] apparently not unconstitutional[, therefore,] if (1) compliance puts no articulable burden upon the decisionmaking process or (2) the burden is not for furtherance of the state's interest in the potential life of the fetus, and is tightly drawn to effectuate only some other legitimate interest of the state."

One decision of the Supreme Court of the United States has come down since the above statement: *Bellotti v. Baird,* supra. That decision, while possibly indicating some retreat from the stiff no-interference-during-the-first-trimester standard clearly adopted in *Roe v. Wade,* 410 U. S. at 164, 93 S. Ct. 705, addressed only the family and its role in society. In that respect, the *Bellotti v. Baird* decision appears limited to state legislation affecting the parents' role in the minor's abortion decision. In any event, it would take a clearer signal from the Supreme Court than that in *Bellotti v. Baird* to demonstrate a retreat from the strict standard announced previously in *Roe v. Wade* and its progeny.

The defendants contend:

> ". . . Where the obstacle does not impinge upon the woman's freedom to make a constitutionally protected decision, or if they merely make the physician [']s work more laborous [sic] or less independent without any impingement on the patient, *Whalen, supra,* 97 S. Ct. 879, the regulations are evaluated under a relaxed standard of scrutiny and the state is afforded broader power to encourage actions thought to be in the public interest. These regulations are subject to the 'less demanding test of rationality,' *Maher, supra,* 97 S. Ct. at 2385, and thus usually found constitutional. *Wynn v. Scott, supra.*"

Pretrial Brief of Defendants, pp. 13-14 Strictly read, this contention is correct. What the defendants contend, however, must not be confused with the facts of the case at bar. The major bones of contention in this case involve the requirements that a woman be exposed to certain information sufficient to constitute an "informed consent" within the terms of the statute and that she wait forty-eight hours after receiving that information before she may obtain an abortion. Absent an emergency situation, the informed-consent and waiting-period requirements would stand between the woman's desiring an abortion and obtaining one. This is a *direct obstacle* to abortion, and the *Maher v. Roe* decision specifically speaks to this:

> ". . . Although a state-created obstacle need not be absolute to be impermissible, . . . we have held that a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.' *Bellotti v. Baird,* 428 U. S. 132, 147 [96 S. Ct. 2857, 2866, 49 L. Ed. 2d 844] (1976). . . ."
>
> 432 U. S. at 473, 97 S. Ct. at 2382.

See, also *Maher v. Roe,* 432 U. S. at 475, 97 S. Ct. 2376.

One comment should be made about the evidence in relation to the standard of review before evaluating the specific sections. The Supreme Court's current position regarding interference with the doctor-patient relationship in the first trimester of pregnancy is very strict: the state may interpose few, if any, restrictions in that area. Compare *Roe v. Wade,* 410 U. S. at 163-164, 93 S. Ct. 705, with *Planned Parenthood of Missouri v. Danforth,* 428 U. S. at 67, n. 8, 96 S. Ct. at 284, n. 8 (the state may not "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession"). The defendants contend that the Supreme Court, when making

these rulings, did not envision the possibility that they would create abortion factories churning out assembly line abortions. The defendants argue that the Supreme Court has relied upon two assumed medical facts: (1) that there are relatively few complications, either short- or long-term, and almost universal safety in trimester abortions, and (2) that the physician-patient relationship is such that a woman seeking an abortion will openly confide in her physician, who in turn will probe her conscience and answer her questions. The defendants, in building an appellate record, have sought to refute these underlying assumptions by presenting extensive evidence on this subject. I make no findings of fact with respect to the greatest part of this evidence; that is not appropriate, it would seem, until the Supreme Court is ready to overrule *Roe v. Wade* or at least substantially limit it. I only make those findings of fact necessary to appraise this legislation pursuant to current constitutional standards. In this respect, it cannot be overemphasized that the challenged legislation does not differentiate with respect to trimesters of pregnancy. Thus, all of the legislation must be judged according to the most rigorous standard—that reserved for legislation touching upon the first trimester of pregnancy. See *Roe v. Wade*, supra; *Planned Parenthood of Missouri v. Danforth*, supra.

B.

The plaintiffs challenge the reporting section, 28-343, as well as its accompanying penalty section, 28-344, on the ground that it is void for vagueness. Section 28-343 provides that the attending physician shall complete a form, established by the Bureau of Vital Statistics, for "every abortion performed or prescribed." The form is to include

such information as the age of the pregnant woman, the type of procedure performed, any complications arising during that procedure, and the reasons for which the abortion was requested.[18] Section 28-343 lists the items to be

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18 "28-343. The Bureau of Vital Statistics, Department of Health, shall establish an abortion reporting form, which shall be used for the reporting of every abortion performed or prescribed in this state. Such form shall include only the following items:

(1) The age of the pregnant woman;

(2) The location of the facility where the abortion was performed;

(3) The type of procedure performed;

(4) Complications, if any;

(5) The name of the attending physician;

(6) The pregnant woman's obstetrical history regarding pregnancies, abortions, and live births;

(7) The stated reason or reasons for which the abortion was requested;

(8) The state of the pregnant woman's legal residence;

(9) The length and weight of the aborted child, when measurable; and

(10) Whether an emergency situation caused the physician to waive any of the requirements of section 28-327 or 28-333.

"The completed form shall be signed by the attending physician and sent to the Bureau of Vital Statistics within fifteen days after each reporting month. The completed form shall be an original, typed or written legibly in durable ink, and shall not be deemed complete unless the omission of any item of information required shall have been disclosed or satisfactorily accounted for. Carbon copies shall not be acceptable. The abortion reporting form required under this section shall not include the name of the person upon whom the abortion was performed. The abortion reporting form required under this section shall be confidential and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding."

included in the form and states that the form "shall include only" those items. The items relate to abortions which are "performed;" none of these items, however, relate to an abortion "prescribed." Interestingly, the two locations in the form required by the predecessor of L.B. 316 to contain information about prescribed abortions do not now require such information. In L.B. 316, the legislature deleted the words "or prescribed" from the present subsections numbered (2) and (3). I preliminarily enjoined § 28-343 only insofar as it requires the reporting of prescribed abortions, and reasoned as follows:

> ". . . Failure to eliminate the words 'or prescribed' at the beginning of the section, which declares that the reporting form 'shall be used for the reporting of every abortion performed *or prescribed* in this stage,' leaves the physician in a position of being charged criminally for failing to report a 'prescribed' abortion, although the form mandated by the statute, which is to contain only certain information, allows no reporting of abortions prescribed but not performed. . . ." Memorandum of April 20, 1979.

Little evidence was adduced at trial regarding the reporting section. The plaintiff physicians did testify to the effect that they would not know how to comply with the requirement of reporting prescribed abortions. Nothing, however, was adduced which would command a different response from the court on the matter. Section 28-343 will be permanently enjoined, insofar as it requires the reporting of "prescribed" abortions.

With respect to the remainder of the reporting section, the plaintiffs raise no serious questions. The information requested is not vague, excessive, or abusive. The state has the power to gather such information. See *Planned parent-*

hood of Missouri v. Danforth, 428 U. S. at 80-81, 96 S. Ct. 2831. The remainder of § 28-343 is constitutional.

C.

Sections 28-326(8), 28-327, 28-328, 28-333, and 28-334 contain the "informed consent" provisions of the Nebraska abortion law. Sections 28-328 and 28-334 provide criminal penalties for failure to comply with §§ 28-327 and 28-333 respectively; § 28-326 (8) defines informed consent. These provisions provide in relevant part:

§ 28-326(8)

> "Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician;"

§ 28-327

> "No abortion shall be performed on any woman in the absence of an informed consent, except that an abortion may be performed if, in the sound medical judgment of the physician, an emergency presents imminent peril that substantially endangers the life of the

woman and the woman is unable to give informed consent."

§ 28-333

"No abortion shall be performed on any minor under the age of eighteen in the State of Nebraska without her informed consent unless an emergency situation exists.

"The informed consent by the minor shall be retained as part of the permanent record of the attending physician for no more than ten years. No person shall disclose any information contained in the informed consent, including the identity of the woman seeking the abortion, without the woman's written authorization or pursuant to an order issued by a court of competent jurisdiction. The Legislature hereby establishes a right of privacy in the State of Nebraska for a cause of action against persons making unauthorized disclosure in violation of this act."[19]

The plaintiffs contend that the informed-consent provisions are void for vagueness, violate the Equal Protection Clause, and unduly burden a woman's freedom to decide to terminate her pregnancy.

The defendants advance two arguments on behalf of the constitutionality of the informed-consent sections. First, they assert that the requirement of an informed consent does not impinge on the pregnant woman's decision-making process and therefore they only need show a rational interest supporting that requirement to sustain it. *Maher v. Roe, supra.* Second, they interpret the informed-consent requirement "only to require that the physician

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19 The portions of § 28-333 relating to parental consent have been omitted, as the court has previously granted summary judgment for the plaintiffs on those portions by order dated August 1, 1979.

not perform an abortion in the absence of an informed consent which is a written document voluntarily entered into in which the patient makes certain affirmative statements regarding the procedure." Defendants' Post-Trial Brief, p. 37. The defendants argue that this greatly reduces the burden imposed on the physician, because:

> ". . . If the document is voluntarily executed by the woman and contains the signature of the attending physician, the prosecutor cannot look further to determine if, in fact, she had been informed of the identified information."
>
> *Id.*

I have already addressed the second argument and rejected it in an opinion dated August 9, 1979, when it was made in support of the defendants' motion to dismiss on abstention grounds. The defendants' suggested interpretation would strain a plain reading of that section.[20] With

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20 In a memorandum and order dated August 9, 1979, I rejected the defendants' suggested interpretation of the section and reasoned as follows:

> "The defendants contend that the foregoing provisions may be construed by the Supreme Court of Nebraska so that a prima facie case for compliance would be made merely by the statement's bearing the signatures of both the person seeking the abortion and the attending physician. This construction, the defendants argue, would alleviate any burden on the abortion procedure, because the attending physician would not be obliged to give to the patient the required information or to ascertain that somebody else had given it to her. The defendants contend that the proposed construction would materially change the nature of the constitutional questions posed by the provisions and therefore this court should abstain, pending an interpretation by the Supreme Court of Nebraska.
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> * * *

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"While I grant that the proposed construction of the informed consent provisions would significantly affect the nature of the constitutional questions involved, I do not agree that the state statute is susceptible of the suggested construction. Such a construction would strain a plain reading of the statute. The provisions instruct that no physician may perform an abortion in the absence of an informed consent. A natural inference of this is that the physician must know that an informed consent has been executed. Unless a doctor or his agent informs the patient according to § 28-326 (3), I do not see how the physician could be assured that the statute has been complied with. One bit of advice required by the provision—that the patient be advised of the abortion procedures 'to be used'—reinforces this conclusion. Who else but the physician or one of the physician's agents would be in a position to tell the patient which abortion procedure is 'to be used' by the physician? Another requirement of the provision—that the consent be signed by both the patient and her physician—militates toward the same conclusion.

"The defendants assert that the dual signature requirement means no more than that the doctor must sign the form, and that he is in a position to accept a patient's word that she has received such advice. This alone would satisfy, at least to the extent of creating a prima facie case of compliance with, the statute. I see no indication of this, however, in the statute. The provision requires the signatures of the patient and the physician by the use of different language. While the informed consent statement must 'bear the signature' of the patient, it must 'be signed' by the physician. Although the use of different language to describe a similar or identical action often indicates an intent on the part of a legislature to differentiate these actions for some purpose, I do not see that use of such a differentiation could point toward the conclusion the defendants urge. At most it could indicate that the patient need not personally sign—she could cause someone else to do it for her, perhaps—but the physician must personally sign the form. That does not go to the question of whether the physician must personally give information to the patient or ascertain that someone else has done it adequately.

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respect to the first argument, I have indicated in section IIIA3 above that this is not an accurate characterization of the effect of the informed-consent requirement. Without an informed consent, the woman seeking an abortion could not obtain one. The informed-consent requirement thus places a direct obstacle between the woman and the abolition. It must be judged according to this effect.

The main thrust of the plaintiffs' vagueness argument centers on subsection (a) of § 28-326 (8). Subsection (a) requires that a woman seeking an abortion indicate that she has been advised of the "reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth." The plaintiffs adduced testimony that indicated confusion as to the meaning of "reasonably possible" medical and mental consequences. The defendants put on contrary evidence. To the extent that a factual finding in this area provides a background for the legal resolution of this issue, I find the defendants' evidence more persuasive. Consequences which are "reasonably possible" are not an impermissibly vague concept. "Possible" consequences are those which have the potential for occurrence. "Reasonably" possible consequences are a subset of possible consequences limited by the bounds of reasonableness. Certainly the concept of "reasonableness" cannot be beyond comprehension. Both plaintiff physicians indicated that they understood the concept of reason-

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"Because the construction offered by the defendants would strain a plain reading of the provisions in question, I conclude that the provisions are not susceptible of this construction in order to warrant deference to the state courts under the abstention doctrine. The defendants' motion must therefore be denied."

ably possible consequences, but that when the idea was fortressed with criminal penalties, rather than civil penalties, they no longer understood its range. The introduction of different penalties does not, however, change the language. The severity of sanctions goes to burden, not vagueness. This phrase gives a person of ordinary intelligence fair notice as to the subject matter of the statute. It would not encourage arbitrary and erratic arrests and convictions. Moreover, the evidence produced on this subject confirms this conclusion.

The upset of the plaintiff physicians' testimony was apparently meant to demonstrate that the "reasonably possible" standard would have a "chilling effect" on the exercise of their constitutional rights. One of the plaintiffs even testified that he would consider terminating his abortion practice if subsection (a) were upheld. The inhibition of the exercise of constitutionally protected rights, however, would not here be a result of "the uncertainty induced by the statute," as required by the *Colautti* court, 439 U.S. at 391, 99 S.Ct. at 683, but rather by fear of criminal penalties. Subsection (a) is neither vague nor overbroad.

The plaintiffs also argue that because experts disagree about the scope of "reasonably possible" consequences, this would permit arbitrary prosecutions according to whichever expert happened to advise the prosecutor. Rather than arbitrary prosecutions, however, the foregoing means that a specialist in obstetrics and gynecology would have to cover a range of disagreement in his profession regarding such consequences in order fully to ensure against criminal prosecution. Moreover, the question is not the

extent—whether great or small—of the range of disagreement; the question for vagueness purposes is whether that range can be ascertained. I find, as a matter of fact and law, that that range is ascertainable, and, incidentally, that that range is not as great as the plaintiffs suggest. No vagueness problems inhere.

In addition to their attack on the concept of "reasonably possible" consequences found in § 28-326 (8) (a), the plaintiffs make other vagueness challenges to the informed-consent provisions. They point to the discrepancy between the exceptions to the informed-consent requirement in §§ 28-333 and 28-327. Section 28-327, which prohibits the performing of an abortion on *any woman* in the absence of an informed consent, except those abortions where "an emergency presents imminent peril that substantially endangers the life of the woman and the woman is unable to give informed consent." Section 28-333, which pertains to the informed-consent requirement for *minors*, excepts those abortions in the context of an "emergency situation." Section 28-326 (7) defines "emergency situation" as follows:

> "Emergency situation shall mean a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman."

By their language, both §§ 28-327 and 28-333 apply to minors. Yet of these two emergency exceptions to the informed-consent requirement, that contained in § 28-327 is more restrictive than that contained in § 28-333. These conflicting exceptions to the informed-consent requirement bear the potential of placing the physician in an irrecon-

cilable dilemma, when he must determine which "emergency" standard governs the performing of an abortion sans informed consent. The appropriate way to solve this impermissibly vague situation is to enjoin one of these sections. Because § 28-327 speaks to all women and because the legislature obviously intended an informed-consent requirement to apply to all women, the enjoining of the enactment specifically addressing minors which has created this disjointed situation—§ 28-333—would better preserve the legislature's intent. Therefore, the first paragraph of § 28-333, as it now stands,[21] will be enjoined.

With respect to the second paragraph of § 28-333, the plaintiffs argue that the term "attending physician" is vague. I have previously rejected this argument; a plain reading of the section indicates that it is to mean the physician who physically performs the abortion.[22] In addition, the plaintiffs argue that the requirement that the informed consent "be retained as part of the permanent record" of the physician "for no more than ten years" is vague and contradictory. They ask:

> ". . . May the physician obtain the document and immediately destroy it? This would certainly not qualify as retention in the permanent records. May the physician obtain the document, place it in the permanent records and immediately remove and discard it? A literal reading would permit this conduct which render [sic] this statute meaningless."

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21 The parental consultation provision of § 28-333 has previously been enjoined. See footnote 3, supra.

22 *Womens Services v. Thone*, CV 79-L-85 (unreported memorandum U. S. D. C. Neb. April 20, 1979, p. 9).

Post-Trial Brief of Ladies Center, p. 18. The plaintiffs make a convincing argument on this point, and the first sentence of the second paragraph of § 28-333 will be stricken for vagueness.

Because the informed consent and parental consultation features of § 28-333 are unconstitutional, the concomitant penalty provision—§ 28-334—stands as an empty shell.[23]

The Equal Protection argument, once the standard of review is reduced to traditional rational-relation grounds, see section III*A*2 above, quickly fails. Only one example is necessary. One legitimate state interest surrounding the abortion decision is maternal health. That this is an interest of the state is obvious both from a reading of the declaration of purpose and from a reading of the informed consent section. That is not a sufficiently compelling interest to justify constitutionally a significant burden on the woman seeking an abortion prior to the second trimester of pregnancy, but it is nonetheless legitimate. A state may reasonably conclude that a requirement that a decision to abort be informed would promote the psychological health of the pregnant woman. Therefore, such an informed-consent requirement bears a rational relation to a legitimate state interest.

The informed-consent requirement does in significant part fail the substantive due process test. As a whole, it unduly burdens a woman's freedom to decide to terminate, and freedom to terminate, her pregnancy. Considering the

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23 The plaintiffs make other arguments regarding §§ 28-333 and 28-334. In light of my holding that the informed-consent requirement of § 28-333 must be enjoined, I need not address those arguments.

threat of criminal penalties for failure to comply with this provision, a physician or an assistant to a physician would unquestionably have to run a gamut of considerations to be assured that the subjects required by these sections to be covered had been covered. Testimony at trial showed that it would take several hours to "advise" (which means more than a cursory listing) a pregnant woman of all the "reasonably possible consequences" of abortion, pregnancy and childbirth. Specifics and detail need not be listed; they are abundantly found in the record. The punch of the statute is from the requirement that the patient be informed of the reasonably possible consequences not only of abortion, but also of pregnancy and childbirth. By refusing to allow the physician an opportunity to tailor this information to the patient, this provision also confines the physician in an unconsitutional straitjacket.

Moreover, the nature of the state's interest—presumably that of maternal health—is not compelling during the first trimester. However, even if that interest were compelling, subsection (a) even by itself is not narrowly drawn to effectuate only that interest. It surpasses the proper limits of "informed" when a woman seeking an abortion must learn about the myriad of medical and mental consequences reasonably resulting from pregnancy and childbirth.

Section 13 of L. B. 316 is a severability clause. It permits the severing of unconstitutional portions of a section without an effect on the remainder of that section.[24] Sub-

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24 "Sec. 13. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof."

section (a) imposes an unconstitutional burden; the remainder of § 28-326 does not. Subsection (a) of § 28-326 (8) will be severed.

Subsections (b) and (c) of § 28-326 (8) do not unduly burden either a woman's decisionmaking process or her obtaining an abortion. *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (U. S. D. C. S. E. D. Pa. 1975), aff'd *sub nom. Franklin v. Fitzpatrick,* 428 U. S. 901 (1976). The time required to convey the information is negligible and the state interest in having it conveyed—that the woman seeking an abortion be aware of the fundamental aspects of the procedure and the fundamental alternative—is tangible. This burden does not reach the degree of requiring any more than a tangible degree of state interest to justify it. Cf. *Planned Parenthood of Missouri v. Danforth,* supra. Moreover, the means of implementing that interest is not so broad as to cause concern.

Mention was made during trial of infanticide's being a possible alternative to abortion, the inference being that an informed consent pursuant to § 28-326 (8) (b) would include this measure. It is not conceivable, however, that the legislature intended for the woman seeking an abortion to be informed of infanticide. It is similarly not conceivable that a physician would be prosecuted for failing to so inform a patient. Such a chimera of counsel poses no genuine burden.

Severing subsection (a) from § 28-326 (8) is consistent with legislative intent. The overriding legislative intent expressed in L. B. 316 is to regulate abortion to the greatest extent within constitutional bounds.

Subsection (a) of § 28-326 (8) will be severed from the remainder of that section, will be declared unconstitutional, and will be permanently enjoined. Also, the first paragraph and the first sentence of the second paragraph of § 28-333 will be permanently enjoined. The remainder of § 28-326 (8) is constitutional, *Planned Parenthood Association v. Fitzpatrick*, supra, and it and the remaining informed-consent provisions will be upheld.

D.

The plaintiffs challenge the forty-eight-hour waiting period from the time the physician obtains an informed consent to the time he may perform an abortion, required by § 28-327[25] and enforced by § 28-328. They claim that the mandated waiting period both violates the Equal Protection Clause and imposes an undue burden on the woman's freedom to obtain an abortion. Because the waiting period does impose an undue burden, the Equal Protection challenge need not be reached.

The stipulation entered into between counsel and the testimony at trial document the increased cost which a woman from western Nebraska, for example, would incur in obtaining an abortion in Nebraska, were this requirement in effect. As the only abortion clinics in Nebraska are found in the Omaha area, the forty-eight-hour delay

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25 Section 28-327 provides in relevant part:

> "No abortion shall be performed on any woman without the passing of at least forty-eight hours between the expression of informed consent and the actual performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists."

would cause her either to make one additional trip to this area or to stay in Omaha the duration of the waiting period. The obvious costs imposed by this waiting period are time, expense and delay. There was conflicting testimony about the amount of increase in risk to the pregnant woman's health caused by the delay. Even if the risk increase were small, it would amount to a secondary type of burden imposed by the waiting period. I find, as a matter of fact, however, the increased risk to be substantial.

The state interest, it seems, is that the woman seeking an abortion should make a thoughtful decision after receiving the information required by the informed consent and more fully realizing her capacity to obtain an abortion. While this may be legitimate, it is not sufficiently compelling to justify the burdens imposed by this direct obstacle to abortion. It must be recalled that this waiting period attaches to the first trimester, the trimester for which the most exacting judicial scrutiny applies. See *Roe v. Wade,* 410 U. S. at 164, 93 S. Ct. 705. For the foregoing reasons, the waiting-period requirement must be permanently enjoined.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

636 F. 2d 206

(8th Cir. 1980)

Womens Services, P. C., a Nebraska Professional Corporation and William G. Orr, M. D.,

Elizabeth F.,

Appellant,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska;
Marilyn A. Schneider,

Appellees.

• • • •

Ladies Center, Nebraska, Inc., a corporation; John M. Epp, M. D.,

Betty Roe, by her next friend Barbara Gaither and Elizabeth F.,

Appellants,

vs.

Charles Thone, Governor for the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska;
Marilyn A. Schneider,

Appellees.

No. 80-1193

Womens Services, P.C., a Nebraska Professional Corporation; G. William Orr, M. D.;
Elizabeth F.,

Appellees,

vs.

Charles Thone, Governor for the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska;

Appellants,

Marilyn A. Schneider,

• • • •

Ladies Center, Nebraska, Inc., a corporation; M. John Epp, M. D.; Betty Roe by her next friend Barbara Gaither and Elizabeth F.,

Appellees,

vs.

Charles Thone, Governor for the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska;

Appellants,

Marilyn A. Schneider,

• • • •

Womens Services, P. C., a Nebraska Professional Corporation and G. William Orr, M. D.,

Appellees,

vs.

Charles Thone, Governor for the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska;

Appellants.

Appeals from the United States District Court
for the District of Nebraska

Submitted: October 13, 1980

Filed: December 8, 1980

Before ROSS, Circuit Judge, GIBSON, Senior Circuit Judge, and SACHS, District Judge.*

PER CURIAM.

These appeals challenge the findings of the district court[1] regarding the constitutionality of various portions of a Nebraska abortion regulation law, NEB. REV. STAT. § 28-325 *et seq.* We affirm the judgment of the district court primarily on the basis of the district court decision. However, because intervening cases have been filed by the Supreme Court, and for other reasons which will later be made obvious, we comment briefly on each aspect of the decision.

The opinion of the district court, *Womens Services, P. C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979), addressed first the issue of whether certain plaintiffs had standing to challenge the legislation. Judge Urbom found that plaintiff Ladies Center had achieved standing because the statute imposed potential criminal liability as accomplices on Ladies Center. *Id.* at 1030-31. The district court held that plaintiff Betty Roe lacked standing because although she was pregnant when the legislation was enacted, she had

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*The Honorable HOWARD F. SACHS, United States District Judge for the Western District of Missouri; sitting by designation.

1 The Honorable WARREN K. URBOM, Chief Judge, United States District Court for the District of Nebraska.

procured an abortion before the law's effective date. *Id.* at 1031.

Next, the district court reviewed the plaintiffs' claim that the legislation violated the Establishment and Free Exercise Clauses of the first amendment. Judge Urbom found that the idea that life begins at conception was a motivating principal of the legislation, but this idea was "as capable of being labeled philosophical as religious • • •." *Id.* at 1036. In finding no establishment clause violation, Judge Urbom applied the three-part test of *Committee for Public Education v. Nyquist*, 413 U. S. 756 (1973). The district court found that the legislation: (1) "reflect[ed] a clearly secular legislative purpose"; (2) had "a primary effect that neither advances nor inhibits religion"; and (3) "avoid[ed] excessive government entanglement with religion." *Nyquist, supra*, 413 U. S. at 773.

Judge Urbom also rejected plaintiffs' free exercise claim, noting there was "no evidence to indicate that a woman's obtaining of an abortion without the regulation • • • would constitute a fundamental tenet of any religion." *Womens Services, P.C. v. Thone, supra*, 483 F. Supp. at 1040.

Finally, the district court dealt with plaintiffs' contentions that various provisions of the law (1) unduly burden a woman's right to decide to terminate her pregnancy; (2) were void for vagueness; and (3) violated the Equal Protection Clause. The findings which concern the parties in these appeals are those in regard to an in-

formed consent provision, NEB. REV. STAT. § 28-326 (8) (a)[2] and a 48-hour waiting period provision, NEB. REV. STAT. § 28-327.[3] In analyzing these provisions, Judge Urbom held that the equal protection claim required only a rational relationship test but the substantive due process claim would require "the most rigorous standard" of review. *Id.* at 1044. Applying these standards, the district court found that the informed consent provision was rationally related to a legitimate state interest but failed the substantive due process test. *Id.* at 1048-49. Judge Urbom noted that the state's interest was not compelling during the first trimester of pregnancy and the provision unduly burdens a woman's freedom to decide to terminate her pregnancy. *Id.* at 1049. The 48-hour waiting period was also found to unduly burden a woman's freedom and the state's interest in a "thoughtful decision" was not sufficiently compelling. *Id.* at 1050.

The parties, on appeal, also dispute two findings of the district court made during the litigation. By order dated August 1, 1979, the district court granted plaintiffs' motion for partial summary judgment, finding unconstitutional a parental consultation requirement, NEB. REV.

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2 NEB. REV. STAT. § 28-326 (8) (a) requires that "the person upon whom the abortion is to be performed [be] advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth."

3 NEB. REV. STAT. § 28-327, in part provides:

> No abortion shall be performed on any woman without the passing of at least forty-eight hours between the expression of informed consent and the actual performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists.

STAT. § 28-333. On August 9, 1979, the district court denied defendants' motion to dismiss which was based on the abstention doctrine. Judge Urbom found that defendants' suggested construction of the informed consent provisions, NEB. REV. STAT. §§ 28-326 (8) and 28-327, "would strain a plain reading of the statute." *Women's Services, P.C. v. Thone*, No. CV-78-289, mem. op. at 2 (D. Neb. Aug. 9, 1979).

Also raised as error on appeal is the decision of the district court to strike the testimony of Senator Fowler. *Appeal 80-1192*

Appellants, Womens Services, P.C., et al., argue that the district court erred in finding that the legislation did not violate the Establishment Clause and the Free Exercises Clause. We disagree.

The Supreme Court recently stated in connection with similar contentions concerning the Hyde Amendment that:

> a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion.

Harris v. McRae, — U.S. —, 48 U.S.L.W. 4941, 4947 (U.S. June 30, 1980), citing *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980). The district court applied the proper test to the legislation in question and correctly found no violation of the Establishment Clause. As the Supreme Court also noted in *Harris v. McRae*, "a statute does [not] violate the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'"

Harris v. McRae, supra, — U. S. —, 48 U. S. L. W. at 4947, citing *McGowan v. Maryland,* 366 U. S. 420, 442 (1961).

Judge Urbom also found that the statute did not violate the Free Exercise Clause. In that regard we note that "'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him [as an individual] in the practice of his religion.'" *Harris v. McRae, supra,* — U. S. at —, 48 U. S. L. W. at 4947, citing *Abington School District v. Schempp,* 374 U. S. 203, 223 (1963). *See also Board of Education v. Allen,* 392 U. S. 236, 249 (1968). Although the proffered testimony of individual women addressed the coercive effect of the statute on the decision to abort and one of the plaintiffs did attempt to relate that decision to her religion, the testimony failed to establish that the decision to abort was "fundamental to" their faith. *Wisconsin v. Yoder,* 406 U. S. 205, 216 (1972).

Additionally, we find no abuse of discretion in Judge Urbom's decision to strike the testimony of Senator Fowler. We also affirm the finding that Betty Roe lacked standing to challenge the legislation for the reasons stated in Judge Urbom's decision.

Appeal 80-1193

Appellants, Charles Thone, et al., allege that the district court erred in holding various provisions of the Nebraska law unconstitutional. Appellants challenge the district court's findings as to § 28-326 (8) (a) (defining informed consent as requiring that the women be advised "of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and child-

birth") and § 28-327 (requiring a 48-hour waiting period "between the expression of informed consent and the actual performance of the abortion * * *.").

Under a substantive due process analysis, Judge Urbom found that the interests of the state were not sufficiently compelling to justify placing such undue burdens, as these, on a woman's freedom to decide whether to terminate her pregnancy. Specifically, Judge Urbom found that it would take "several hours" to advise a woman of the "myriad" of medical and mental consequences resulting from an abortion, pregnancy, and childbirth. Regarding the 48-hour waiting period, Judge Urbom noted that the only abortion clinics in Nebraska are in the Omaha area and, therefore, the waiting period would increase the expense and time necessary for an abortion, especially for women from western Nebraska. Judge Urbom also held that the delay caused a "substantial" increase in risk to the pregnant woman's health.

We agree that legislation which directly interferes with a woman's fundamental right to decide whether to terminate her pregnancy is subject to strict scrutiny under a substantive due process analysis. *Charles v. Carey*, 627 F. 2d 772, 776-78 (7th Cir. 1980). Although not denoting the standard as "strict scrutiny," the district court, in ruling on these two sections, applied "the most rigorous standard" to them. Thus, Judge Urbom's analysis, in effect, applied a strict scrutiny standard and we agree with his analysis in applying such standard of review Because the cited subsections fail under a substantive due process analysis, we make no determination as to whether strict scrutiny should also be applied to the legislation under an equal protection analysis.

Next, appellants urge that the district court erred in holding the parental consultation portion of § 28-333 unconstitutional. Judge Urbom found that the provision could not stand based on the requirements stated in *Bellotti v. Baird*, 443 U. S. 622 (1979) (*Bellotti II*). We agree that *Bellotti II* is applicable to the provision in question and affirm Judge Urbom's findings based on his order of August 1, 1979.

We also reject appellants' arguments that the district court should have abstained from review of the informed consent portion, §§ 28-326 (8) and 28-327, and that Ladies Center, Inc. lacked standing in this action.

Finally, appellants contend that Judge Urbom could have severed some of the language with § 28-326 (8) (a) which required that a woman be advised of the "reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth." This argument has no merit. Even assuming that the language "pregnancy and childbirth" was added to the legislation at the request of the law's opponents, the fact remains that the Nebraska Legislature passed the law including such language. And we would be reluctant to sever language which is so inseparably intertwined within a subsection of the law.

The opinion of the district court is affirmed for the reasons indicated herein. Each party shall pay its own costs.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

28-325. *Abortion; declaration of purpose.* The Legislature hereby finds and declares:

(1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;

(2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973;

(3) That it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion;

(4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life; and

(5) That it is the interest of the people of the State of Nebraska to maintain accurate statistical data to aid

in providing proper maternal health regulations and education.

Source: Laws 1977, LB 38, § 40.

28-326. *Terms, defined.* As used in sections 28-325 to 28-345, unless the context otherwise requires:

(1) Abortion shall mean an act, procedure, device, or prescription administered to a woman known by the person so administering to be pregnant and performed with the intent and result of producing the premature expulsion, removal, or termination of the human life within the womb of the pregnant woman, except that in cases in which the unborn child's viability is treatened by continuation of the pregnancy, early delivery after viability shall not be construed as an abortion for the purposes of sections 28-325 to 28-345;

(2) Hospital shall mean those institutions licensed by the State Board of Health pursuant to sections 71-2017 to 71-2029;

(3) Physician shall mean any person licensed to practice medicine in this state as provided in sections 71-102 to 71-110;

(4) Pregnant shall mean that condition of a woman who has unborn human life within her as the result of conception;

(5) Conception shall mean the fecundation of the ovum by the spermatozoa;

(6) Viability shall mean that stage of human development when the unborn child is potentially able to live outside the womb of the mother by natural or artificial means;

(7) Emergency situation shall mean a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman;

(8) Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician; and

(9) The word signature includes the mark of a person unable to write her name; a mark shall have the same effect as a signature when the name is written by some other person and the mark is made near thereto by the person unable to write her name.

Source: Laws 1977, LB 38, § 41; Laws 1979, LB 316, § 1.

28-327. *Abortion; informed consent required; waiting period; exception.* No abortion shall be performed on any woman in the absence of an informed consent, except that an abortion may be performed if, in the sound medi-

cal judgment of the physician, an emergency presents imminent peril that substantially endangers the life of the woman and the woman is unable to give informed consent.

No abortion shall be performed on any woman without the passing of at least forty-eight hours between the expression of informed consent and the actual performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists.

Source: Laws 1977, LB 38, § 42; Laws 1979 LB 316, § 2.

28-328. *Failure to inform; violation; penalty.* Violation of section 28-327 is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 43.

28-329. *Abortion; when not to be performed.* No abortion shall be performed after the time at which, in the sound medical judgment of the attending physician, the unborn child clearly appears to have reached viability, except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health.

Source: Laws 1977, LB 38, § 44; Laws 1979, LB 316, § 3.

28-330. *Abortion procedure; protection of viable unborn child.* In any abortion performed pursuant to section 28-329, all reasonable precautions, in accord with the sound medical judgment of the attending physician and compatible with preserving the woman from an imminent peril that substantially endangers her life or health, shall be taken to insure the protection of the viable, unborn child.

Source: Laws 1977, LB 38, § 45; Laws 1979, LB 316, § 4.

28-331. *Care and treatment of child aborted.* All reasonable steps, *in accord* with the sound medical judgment of the attending physician, shall be employed in the treatment of any child aborted alive with any chance of survival.

Source: Laws 1977, LB 38, § 46; Laws 1979, LB 316, § 5.

28-332. *Violation; penalty.* Violation of section 28-329, 28-330, or 28-331 is a Class IV felony.

Source: Laws 1977, LB 38, § 47.

28-333. *Abortion; minor under eighteen; informed consent and consultation requirement; record; confidential; right of privacy.* No abortion shall be performed on any minor under the age of eighteen in the State of Nebraska without her informed consent and a written statement by her indicating that she has consulted with her parent or guardian concerning the performance of an abortion, unless an emergency situation exists. The statement of consultation shall be in the following form:

I, _____, a minor have advised my parent(s) or guardian that I am pregnant and contemplating an abortion and have consulted with them concerning the contemplated abortion.

Date _____

Signed _____

The informed consent by the minor and the statement of consultation with the parent or guardian shall be retained as part of the permanent record of the attending

physician as evidence of the requirement of consultation for no more than ten years. No person shall disclose any information contained in the informed consent or the statement of consultation, including the identity of the woman seeking the abortion, without the woman's written authorization or pursuant to an order issued by a court of competent jurisdiction. The Legislature hereby establishes a right of privacy in the State of Nebraska for a cause of action against persons making unauthorized disclosure in violation of this act.

Source: Laws 1977, LB 38, § 48; Laws 1978, LB 748, § 6; Laws 1979, LB 316, § 6.

28-334. *Abortion performed without informed consent or consultation; penalty.* The performing of an abortion without the informed consent or written statement required in section 28-333 when the attending physician knew or should have known that the woman upon whom the abortion was performed was under the age of eighteen or was not married or the unauthorized disclosure of information protected under section 28-333 is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 49; Laws 1979, LB 316, § 7.

28-335. *Abortion by other than licensed physician; penalty.* The performing of an abortion by any person other than a licensed physician is a Class IV felony.

Source: Laws 1977, LB 38, § 50.

28-336. *Abortion by other than accepted medical procedures; penalty.* The performing of an abortion by using anything other than accepted medical procedures is a Class IV felony.

Source: Laws 1977, LB 38, § 51.

28-337. *Hospital, clinic, institution; not required to admit patient for abortion.* No hospital, clinic, institution, or other facility in this state shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein, but the hospital, clinic, institution, or other facility shall inform the patient of its policy not to participate in abortion procedures. No cause of action shall arise against any hospital, clinic, institution, or other facility for refusing to perform or allow an abortion.

Source: Laws 1977, LB 38, § 52.

28-338. *No person required to perform an abortion; no liability for refusal.* No person shall be required to perform or participate in any abortion, and the refusal of any person to participate in an abortion shall not be a basis for civil liability to any person. No hospital, governing board, or any other person, firm, association, or group shall terminate the employment or alter the position of, prevent or impair the practice or occupation of, or impose any other sanction or otherwise discriminate against any person who refuses to participate in an abortion.

Source: Laws 1977, LB 38, § 53.

28-339. *Discrimination against person refusing to participate in an abortion; violation; penalty.* Any violation of section 28-338 is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 54.

28-340. *Discrimination against person refusing to participate in an abortion; damages.* Any person whose

employment or position has been in any way altered, impaired, or terminated in violation of sections 28-325 to 28-345 may sue in the district court for all consequential damages, lost wages, reasonable attorney's fees incurred, and the cost of litigation.

Source: Laws 1977, LB 38, § 55.

28-341. *Discrimination against person refusing to participate; injunctive relief.* Any person whose employment or position has in any way been altered, impaired, or terminated because of his refusal to participate in an abortion shall have the right to injunctive relief, including temporary relief, pending trial upon showing of an emergency, in the district court, in accordance with the statutes, rules, and practices applicable in other similar cases.

Source: Laws 1977, LB 38, § 56.

28-342. *Aborted child; sell, transfer, distribute, give away violation; penalty.* The knowing, willful, or intentional sale, transfer, distribution, or giving away of any live or viable aborted child for any form of experimentation is a Class III felony. The knowing, willful, or intentional consenting to, aiding, or abetting of any such sale, transfer, distribution, or other unlawful disposition of an aborted child is a Class III felony. This section shall not prohibit or regulate diagnostic or remedial procedures the purpose of which is to preserve the life or health of the aborted child or the mother.

Source: Laws 1977, LB 38, § 57; Laws 1979, LB 316, § 8.

28-343. *Bureau of Vital Statistics; abortion reporting form; items included; confidential.* The Bureau of

Vital Statistics, Department of Health, shall establish an abortion reporting form, which shall be used for the reporting of every abortion performed or prescribed in this state. Such form shall include only the following items:

(1) The age of the pregnant woman;

(2) The location of the facility where the abortion was performed;

(3) The type of procedure performed;

(4) Complications, if any;

(5) The name of the attending physician;

(6) The pregnant woman's obstetrical history regarding previous pregnancies, abortions, and live births;

(7) The stated reason or reasons for which the abortion was requested;

(8) The state of the pregnant woman's legal residence;

(9) The Length and weight of the aborted child, when measurable; and

(10) Whether an emergency situation caused the physician to waive any of the requirements of section 28-327 or 28-333.

The completed form shall be signed by the attending psysician and sent to the Bureau of Vital Statistics within fifteen days after each reporting month. The completed form shall be an original, typed or written legibly in durable ink, and shall not be deemed complete unless the omission of any item of information required shall have

been disclosed or satisfactorily accounted for. Carbon copies shall not be acceptable. The abortion reporting form required under this section shall not include the name of the person upon whom the abortion was performed. The abortion reporting form required under this section shall be confidential and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding.

Source: Laws 1977, LB 38, § 58; Laws 1979, LB 316, § 9.

28-344. *Reporting form; violation; penalty.* Violation of section 28-343 is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 59.

28-345. *Department of Health; permanent file; rules and regulations.* The Department of Health shall prepare and keep on permanent file compilations of the information submitted on the abortion reporting forms pursuant to such rules and regulations as established by the Department of Health, which compilations shall be a matter of public record. Under no circumstances shall the compilations of information include the name of any attending physician or identify in any respect facilities where abortions are performed. The Department of Health, in order to maintain and keep such compilations current, shall file with such reports any new or amended information.

Source: Laws 1977, LB 38, § 60; Laws 1979, LB 316, § 10.

28-346. *Aborted infant; experimentation; prohibited; exception; penalty.* No person shall knowingly, intentionally, or willfully use any premature infant aborted alive

for any type of scientific, research, laboratory, or other kind of experimentation except as necessary to protect or preserve the life or health of such premature infant aborted alive. Violation of this section is a Class IV felony.

Source: Laws 1979, LB 316, § 11.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 80-1509

Charles THONE, Governor of Nebraska, et al.,

vs.

Womens Services, P.C., etc., et al.,

O R D E R

The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of H. L. v. Matheson, 450 U. S. — (1981). Justice Brennan, Justice Marshall and Justice Blackmun dissent and would affirm the judgment.

June 8, 1981

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
September Term, 1980

Nos. 80-1192 and 80-1193

Womens Services, P.C., etc., et al.,

Appellants,

vs.

Charles Thone, etc., et al.,

Appellees.

Appeals from the United States District Court
for the District of Nebraska

By order dated June 8, 1981, the Supreme Court has vacated the judgment of this court and remanded the case to this court for further consideration in light of *H. L. v. Matheson,* 450 U. S. —, 49 U. S. L. W. 3911 (U. S. June 8, 1981). This court withdrew its mandate on July 13, 1981.

It is the order of this court that the case is remanded to the district court for further consideration in light of *H. L. v. Matheson* and *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft,* Nos. 80-1130 and 80-1530 (8th Cir. July 8, 1981).

The district court is not directed to stay the permanent injunction now in effect. However, before reconsideration of the case, the district court, in its discretion,

may modify its injunction granted in its order of November 9, 1979, in regard to the constitutionality of the parental notification requirement of NEB. REV. STAT. § 28-333.

Mandate forthwith.

July 23, 1981

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV78-L-289

CV79-L-85

WOMENS SERVICES, P.C., et al.,
Plaintiffs,

vs.

CHARLES THONE, et al.,
Defendants.

CV79-L-100

LADIES CENTER, NEBRASKA, INC., et al.
Plaintiffs,

vs.

CHARLES THONE, et al.,
Defendants.

MEMORANDUM ON MOTIONS FOR
SUMMARY JUDGMENT
(Filed May 24, 1982)

The Court of Appeals for the Eighth Circuit on July 23, 1981, remanded these consolidated cases for further consideration in light of *H. L. v. Matheson,* 450 U. S. 398 (1981), and *Planned Parenthood Association of Kansas City v. Ashcroft,* 655 F. 2d 848, Supp. Op. 664 F. 2d 687 (C. A. 8th Cir. 1981). Subsequent to the remand, by a memorandum and order dated November 25, 1981, Jane Roe I and Jane Roe II were allowed to intervene as plaintiffs in

CV79-L-100 and to maintain class actions on behalf of, respectively, a class of mature pregnant minor women who wish to terminate their pregnancies but who do not wish to consult their parents regarding their intentions, and a class of minor women seeking to terminate their pregnancies but who do not wish to consult their parents regarding their intentions for the reason that it would not be in their best interests to do so. Dr. Orr and Dr. Epp were allowed to amend their verified complaints to include allegations that a percentage of each doctor's patients seeking abortions includes minors under the age of eighteen years who desire abortions but who do not wish to consult with their parents regarding their wishes and who are either emancipated minors, mature minors, or "best interest" minors. All of the plaintiffs have now moved for a summary judgment declaring unconstitutional and permanently enjoining the enforcement of the parental consultation requirements of § 28-333, R. R. S. Neb. (Reissue 1979), and § 28-334, R. R. S. Neb. (Reissue 1978), to the extent that it enforces the parental consultation requirements of § 28-333.

The parties have stipulated that the plaintiffs and intervenors have standing to challenge the constitutionality of §§ 28-333 and 28-334, as well as all other Nebraska statutes challenged in these consolidated actions; that the testimony, exhibits and briefs of counsel previously taken into consideration by this court in determining the constitutionality of §§ 28-333 and 28-334, together with the amended verified complaints of the plaintiffs and the verified complaints of the intervenors, Jane Roe I and Jane Roe II, may be considered by this court in ruling on the parties' motions for summary judgment; that *Bellotti*

v. Baird, 443 U. S. 662 (1979), *Bellotti II*, and *Planned Parenthood Association of Kansas City v. Ashcroft*, supra, are controlling on the issues presented as to the constitutionality of §§ 28-333 and 28-334; and that the constitutionality of the statutes is now submitted to this court for reconsideration without additional evidence, arguments, or written briefs.

In *H. L. v. Matheson*, supra, the plaintiff, an unmarried, pregnant, minor woman living with and dependent on her parents, challenged the constitutionality of a state statute requiring a physician to notify, if possible, the parents or guardian of a minor pregnant woman prior to performing an abortion. The plaintiff contended the statute was overbroad in that it could be construed to apply to all unmarried minor women, including those who are mature and emancipated. The Supreme Court refused to reach this question, because the plaintiff had not alleged or proved that she or any member of her class was mature or emancipated and she therefore lacked "the personal stake in the controversy needed to confer standing to advance the overbreadth argument." 450 U. S. at 405-406. As applied to an immature, unemancipated minor, the court held that a statute setting out a "mere requirement of parental notice" is not unconstitutional. *Id.*, at 409-413.

The question left open in *Matheson*—i. e., whether it is constitutionally permissible to require mature or best interest minors to notify their parents prior to a court hearing in which they seek judicial consent for an abortion—was addressed by the Court of Appeals for the Eighth Circuit in *Planned Parenthood Association of*

Kansas City v. Ashcroft, supra. In *Ashcroft*, the plaintiffs--corporations and physicians seeking to provide abortion services--established that their patients included minors mature enough to make a decision without parental involvement or for whom parental consultation was not in their best interests. Relying on *Bellotti II*, supra, the court held unconstitutional the Missouri statute requiring mature or "best interest" minors to give their parents notice prior to the court hearing authorized by the statute. 655 F. 2d at 859.

The parental consultation statute challenged in this case—§ 28-333—prohibits the performance of a nonemergency abortion on "any minor under the age of eighteen" without a written statement by the minor indicating that she had consulted with her parents or guardian concerning the performance of an abortion. Section 28-334 makes it a misdemeanor to perform an abortion without the written statement required by § 28-333. On its face, the statute applies to any minor, regardless of her maturity or her best interests. No procedure is provided by which a mature or "best interest" minor can go direct to a court without first consulting with her parents concerning the contemplated abortion. As stated in *Bellotti II*, (opinion of Powell, J., joined by Burger, C. J., Stewart and Rehnquist, JJ.), involving a class of concededly mature minors:

> "... [E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision in-

dependently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interest, it may decline to sanction the operation." 443 U. S. at 647-648.

As noted, Jane Roe I and Jane Roe II, a mature and a "best interest" pregnant minor, respectively, have been permitted to intervene and to maintain class actions on behalf of similarly situated pregnant minor women, and Drs. Orr and Epp have been permitted to amend their verified complaints to allege that their patients include emancipated, mature and "best interest" pregnant minor women. The parties have stipulated, and I find, that under *Matheson,* supra, *Bellotti II,* supra, and *Ashcroft,* supra, these plaintiffs have standing to challenge the overbreadth of §§ 28-333 and 28-334. I further find, based on these same opinions, that the parental consultation requirements of § 28-333, and, as they relate to these requirements, the enforcement provisions of § 28-334, are unconstitutional.

Dated May 24, 1982.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV78-L-289

CV79-L-85

WOMENS SERVICES, P.C., et al.,
Plaintiffs,

vs.

CHARLES THONE, et al.,
Defendants.

CV79-0-100

LADIES CENTER, NEBRASKA, INC., et al.,
Plaintiffs,

vs.

CHARLES THONE, et al.,
Defendants.

ORDER
(Filed May 24, 1982)

Pursuant to the accompanying memorandum on motions for summary judgment,

IT IS ORDERED:

1. That the plaintiffs' motions for summary judgment with respect to § 28-333 and § 28-334, filings 144, 145 and 147 in CV78-L-289, filings 179, 180 and 182 in CV79-L-85, and filings 196 and 197 in CV79-L-100, are granted insofar as they relate to the parental consultation requirements of those sections; and

2. That the judgment of this court entered on November 9, 1979, in the above-captioned consolidated cases is reaffirmed.

Dated May 24, 1982.

BY THE COURT
/s/ Warren K. Urbom
Chief Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 82-1786

Womens Services, P.C., a Nebraska Corporation, and G. William Orr, M. D.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Appellants.

* * * *

Womens Services, P.C., a Nebraska Corporation, and G. William Orr, M. D.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,
Marilyn A. Schneider, Intervenor,

Appellants.

* * * *

Ladies Center, Nebraska, Inc., a Corporation; E. John Epp, M. D.; and Betty Roe, by her next friend Barbara Gaither,

Elizabeth F., Intervenor,
Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska
Marilyn A. Schneider, Intervenor,
Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: September 16, 1982
Filed: October 14, 1982

Before ROSS, McMILLAN and ARNOLD, Circuit Judges.

PER CURIAM.

These consolidated appeals challenge the findings of the district court[1] regarding the constitutionality of portions of the Nebraska statutes regulating abortion. NEB. REV. STAT. §§ 28-325 to 28-346 (1979). The district court initially found the challenged sections unconstitutional. *Womens Services, P.C. v. Thone,* 483 F. Supp. 1022 (D. Neb. 1979). This court, in a per curiam opinion, affirmed the judgment of the district court. *Womens Services, P.C. v. Thone,* 636 F. 2d 206 (8th Cir. 1980). The

---

1 The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

United States Supreme Court, on June 8, 1981, vacated the judgment of this court and remanded the case "for further consideration in light of *H. L. v. Matheson*, 450 U. S. 398 (1981)." *Thone v. Womens Services, P.C.*, 452 U. S. 911 (1981). This court remanded the case to the district court "for further consideration in light of *H. L. v. Matheson* and *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, Nos. 80-1130 and 80-1530 (8th Cir. July 8, 1981)." *Womens Services, P.C. v. Thone*, Nos. 80-1192 and 80-1193 (8th Cir. July 23, 1981).

On remand, the district court held that the parental consultation requirements of NEB. REV. STAT. § 28-333 (1979) were unconstitutional and reaffirmed its 1979 judgment. The state defendants appeal and contend that the district court applied an incorrect standard in reviewing the abortion legislation. We affirm the judgment of the district court.

Originally, the issues on appeal involved Nebraska statutes which required: (1) parental consultation by a minor under the age of eighteen, NEB. REV. STAT. § 28-333 (1979); (2) signature of an informed consent form, NEB. REV. STAT. §§ 28-326(8) and 28-327 (1979); (3) a 48-hour waiting period, NEB. REV. STAT. § 28-327 (1979); and (4) reporting of prescribed abortions to the Nebraska Department of Health, NEB. REV. STAT. § 28-343. The state, in its brief and at oral argument, stated that it no longer defends the constitutionality of the parental consultation requirement. The state in the present appeal argues that the Supreme Court in *H. L. v. Matheson, supra*, set out a new standard of review for statutes which regulate abortions.

This court has addressed questions substantially similar to those presented here in *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F. 2d 848 (8th Cir. 1981), *cert. granted*, 102 S. Ct. 2267 (1982). The panel in *Ashcroft* stated that:

> We perceive the settled standard in reviewing state regulation of abortion rights of the mother to be (1) whether the state requirement imposes a substantial interference and burden on the woman's decision to have an abortion and if so (2) whether the state has shown a compelling basis for the law, that is, that the burden is not undue or unjustifiable. [Citation omitted.] In applying the strict scrutiny test, it, of course, must be acknowledged that the state has a compelling interest in the health of the mother and may regulate abortion "in ways that are reasonably related to maternal health." [*Roe v. Wade*, 410 U. S. 113, 164 (1973).]

Id. at 855. The court in *Ashcroft* discussed the Supreme Court's opinion in *H. L. v. Matheson* and stated that

> *Matheson* holds that the state may require that notice be given to the parents of a minor who is living with and dependent upon her parents, is not emancipated by marriage or otherwise, and has made no claim or showing as to her maturity or her relations with her parents. * * * The Court narrowed its decision to these facts because the plaintiff "did not allege or proffer any evidence that either she or any member of her class is mature and emancipated."

Planned Parenthood Ass'n of Kansas City v. Ashcroft, supra, 655 F. 2d at 859. The panel in *Ashcroft* did not read *H. L. v. Matheson* as imposing a new standard of review of statutes which regulate abortion. Principles of *stare decisis* preclude this panel from overruling a prior opinion of this circuit. Additionally, this court stated

"Judge Urbom's analysis, in effect, applied a strict scrutiny standard and we agree with his analysis in applying such a standard of review." *Womens Services, P. C. v. Thone, supra,* 636 F. 2d at 210.

Accordingly, after a careful reading of *H. L. v. Matheson,* we reaffirm the district court's holding that the challenged statutes are unconstitutional.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX H

JUDGMENT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

September Term, 1982

No. 82-1786

CV78-L-289
CV79-L-85
CV79-L-100

Womens Services, et al.,

Appellees,

vs.

Charles Thone, etc., et al.,

Appellants.

• • •

Womens Services, et al.,

Appellees,

vs.

Charles Thone, etc., et al.,

Appellants.

• • •

Ladies Center, etc., et al.,

Appellees,

vs.

Charles Thone, etc., et al.,

Appellants.

(Filed November 17, 1982)

This appeal from the United States District Court for the ———— District of Nebraska was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

October 14, 1982

A True Copy:

ATTEST:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX I

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 82-1786

Womens Services, P.C., a Nebraska Corporation, and G. William Orr, M.D.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Appellants.

* * * *

Womens Services, P.C., a Nebraska Corporation, and G. William Orr, M.D.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Marilyn A. Schneider, Intervenor,

Appellants.

* * * *

Ladies Center, Nebraska, Inc., a Corporation; E. John Epp, M. D.; and Betty Roe, by her next friend Barbara Gaither, Elizabeth F., Intervenor,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska;

and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,
Marilyn A. Schneider, Intervenor,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed November 10, 1982)

NOTICE is hereby given that Charles Thone, Governor of the State of Nebraska, Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska, the appellants in the above styled cause, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Eighth Circuit dated October 14, 1982, which judgment affirmed the final judgment of the United States District Court for the District of Nebraska dated May 24, 1982.

This appeal is taken pursuant to 28 U. S. C. § 1254, paragraph (2).

CHARLES THONE, Governor of the State of Nebraska, et al., Appellants,

By: PAUL L. DOUGLAS
Attorney General

By: JEROLD V. FENNELL
Special Assistant Attorney General

711 First National Bank Building
Omaha, Nebraska 68102
(402) 344-0570

Attorneys for Appellants

No. 82-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees,

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

LADIES CENTER, NEBRASKA, INC., *et al.*,
Appellees,

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees.

On Appeal from The United States Court of Appeals
for the Eighth Judicial Circuit

MOTION AND BRIEF OF APPELLEES TO DISMISS APPELLANTS' "JURISDICTIONAL STATEMENT" AND TO AFFIRM THE JUDGMENTS BELOW

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees,

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

LADIES CENTER, NEBRASKA, INC., *et al.*,
Appellees,

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees.

On Appeal from The United States Court of Appeals
for the Eighth Judicial Circuit

MOTION OF APPELLEES TO DISMISS APPELLANTS' "JURISDICTIONAL STATEMENT" AND TO AFFIRM THE JUDGMENTS BELOW

Come now Appellees and pursuant to Rule 16.1(a) of this Honorable Court move to dismiss the "Jurisdictional Statement," heretofore filed by Appellants for failure to conform to Rule 33.2(a)(4) of this Honorable Court.

Come now Appellees and pursuant to Rule 16.1(c) and (d) of this Honorable Court move to affirm the PER CURIAM decision of October 14, 1982, as unanimously rendered by the United States Court of Appeals for the Eighth Judicial Circuit in Appeal No. 82-1786, reported at 690 F.2d 667 (8th Cir. 1982), the Honorable Donald R. Ross, Theodore McMillian and Richard Sheppard Arnold, Circuit Judges, presiding.

Said named Appellees move to affirm on the grounds that it is manifest that the federal questions raised by Appellants are so unsubstantial as to need no further argument nor adjudication; on the grounds that the judgments below rest upon adequate non-federal bases; and on the grounds that said federal questions, even if substantial, have been expressly, repeatedly, wisely and convincingly decided by this Honorable Court, by other Circuit Courts of Appeals and by other District Courts in a manner wholly consistent with the opinion below.

WHEREFORE, said named Appellees pray this Honorable Court to dismiss Appellants' "Jurisdictional Statement" and to affirm the decision herein appealed.

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No. 82-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees,

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

LADIES CENTER, NEBRASKA, INC., *et al.*,
Appellees,

ROBERT KERREY, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees.

On Appeal from The United States Court of Appeals
for the Eighth Judicial Circuit

BRIEF OF APPELLEES IN SUPPORT OF THEIR MOTION TO DISMISS APPELLANTS' "JURISDICTIONAL STATEMENT" AND TO AFFIRM THE JUDGMENTS BELOW

ARGUMENT

This Appeal Fails To Raise A Substantial Federal Question As To The Appropriate Legal Standard Of Review Under The Federal Constitution Of Statutes Regulating The Performance Of Abortions.

The appropriate legal standard for constitutional review of abortion regulation has been clearly established by this Honorable Court in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973) and their progeny.

The various Circuits have been uniformly consistent in the interpretation and application of such standards. See: *Baird* v. *Department of Public Health of The Commonwealth of Massachusetts*, 599 F.2d 1098, 1102 (1st Cir. 1979); *Poe* v. *Gerstein*, 517 F.2d 787, 791 (5th Cir. 1975), *affirmed*, 428 U.S. 901 (1976); *Mahoning Women's Center* v. *Hunter*, 610 F.2d 456, 459 (6th Cir. 1979), *vacated and remanded on other grounds*, 447 U.S. 918 (1980); *Charles* v. *Carey*, 627 F.2d 772, 777 (7th Cir. 1980); *Reproductive Health Services* v. *Freeman*, 614 F.2d 585, 594 (8th Cir. 1980), *vacated and remanded on other grounds*, 449 U.S. 809 (1980).

Appellants raise before this Honorable Court one issue; their claim that this Honorable Court in *H.L.* v. *Matheson*, 450 U.S. 398 (1981) reversed eight years of holdings as to the standards of constitutional review for restrictive abortion legislation. Numerous Circuit Courts have reaffirmed the strict teachings of *Roe* v. *Wade*, 410 U.S. 113 (1973), subsequent to this Honorable Court's opinion in *H.L.*, *supra*. See *Deerfield Medical Center* v. *City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981) (decided eight months subsequent to *H.L.*) (reaffirming the standards of *Roe* at 334-35); *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 651 F.2d 1198, (6th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3934 (May 24, 1982)

(noting *H.L.* at 1205-06) (reaffirming the standards of *Roe* at 1202-03); *Scheinberg* v. *Smith*, 659 F.2d 476 (5th Cir. Unit B. 1981) (noting *H.L.* at 485) (reaffirming the standards of *Roe* at 482-83); and *Planned Parenthood Association — Chicago Area* v. *Kempiners*, 531 F.Supp. 320 (N.D.Ill. 1981) (noting *H.L.* at 328) (reaffirming the standards of *Roe* at 327-29).

As the Eighth Circuit below determined:

> The court in *Ashcroft* [*Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft*, 655 F.2d 848 (8th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3934 (May 24, 1982)] discussed the Supreme Court's opinion in *H.L.* v. *Matheson* and * * * did not read *H.L.* v. *Matheson* as imposing a new standard of review of statutes which regulate abortion.

(App. 87; 690 F.2d at 668).

CONCLUSION

Appellants would have this Honorable Court believe that they alone have divined the hidden, crytic message of *H.L.*; which they maintain reverses outright the standard of strict scrutiny imposed by *Roe, Doe* and their progeny. A radical, yet surreptitious, message that Appellants apparently would maintain was intentionally imposed by a majority of this Honorable Court in a few brief words, overlooked and concurred in by the dissent in *H.L.* without a mention of the same, and ignored by commmenting legal scholars and by numerous courts, *supra*. Included in those who have apparently missed this purported substantive point in *H.L.* would be this Honorable Court; a point that Appellants maintain they so perceptively and intuitively have grasped. The spurious issue herein raised by Appellants does not warrant plenary review by this Honorable Court.

WHEREFORE, for the reasons, law, equity and argument above presented, Appellees respectively pray that the judgment of the Circuit Court below be affirmed, that Appellees be awarded their attorneys' fees and costs incurred by reason of this appeal, that all costs herein be assessed against Appellants and for such other orders as this Honorable Court deems appropriate.

Respectfully submitted,

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No. 82-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT KERREY, Governor of Nebraska, et al.,
Appellants,

—vs.—

WOMEN'S SERVICES, P.C., et al.,
Appellees.

ROBERT KERREY, Governor of Nebraska, et al.,
Appellants,

—vs.—

LADIES CENTER, NEBRASKA, INC., et al.,
Appellees.

ROBERT KERREY, Governor of Nebraska, et al.,
Appellants,

—vs.—

WOMEN'S SERVICES, P.C., et al.,
Appellees.

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

1. Whether this Court's decision in H.L. v. Matheson, 450 U.S. 398 (1981), governs the appropriate standard of review for abortion-specific statutes which apply to adult women.

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STATUTES:

INTRODUCTION

The Appellee above named respectfully moves, pursuant to Supreme Court Rule 16.1(c), that the Court affirm the judgment below because the question presented is so unsubstantial as not to need further argument. The judgment of the Court of Appeals for the Eighth Circuit is also subject to affirmance because it is manifestly correct under controlling principles of law.

OPINIONS BELOW

(See Jurisdictional Statement of Appellant, Robert Kerrey)

JURISDICTION

(See Jurisdictional Statement of Appellant, Robert Kerrey)

STATUTORY PROVISIONS

Neb. Rev. Stat. §§28-326(8)(a); 28-327; and 28-343.

The pertinent text of the above cited statutes are reprinted in the Appendix to the Jurisdictional Statement (App. 64-74[1]).

STATEMENT OF THE CASE

The relevant facts are set out in the opinions below, which are reprinted in the Appendix to the Jurisdictional Statement and in Appellant's Procedural Overview (J.S. 3-6[2]). Appellant's

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[1] Citations in this form refer to the Appendix to the Jurisdictional Statement filed herein.

[2] Citations in this form refer to the Jurisdictional Statement.

Statement of the Facts (J.S. 6-8), however, is irrelevant, since the issue presented by this appeal is not the manner in which the District Court weighed evidence presented by Appellants at the trial on the nature of the state's interest in enacting the challenged legislation, but whether H.L. v. Matheson, 450 U.S. 398 (1981), is controlling on the issue of the appropriate standard of review for abortion-specific legislation applicable to adult women.

ARGUMENT

1. The judgment of the Court of Appeals for the Eighth Circuit should be affirmed because the question presented is so unsubstantial as not to need further argument.

This Court's remand to the Eighth Circuit "for further consideration in light of H.L. v. Matheson" (App. 74)

clearly refers to the striking down of the Nebraska parental consultation requirement, Neb. Rev. Stat. §§28-333 and 334. (App. 68-69).[3] The remand had no bearing on the lower courts' decisions regarding the informed consent, waiting period and reporting provisions, all of which apply to adult women. Neb. Rev. Stat. §§28-326(8)(a); 327 and 343. (App. 66-67, 71-73). In H.L. v. Matheson, 450 U.S. 398 (1981), this Court upheld as constitutional a Utah statute requiring prior parental notification for minors seeking abortions, but only as applied to immature, dependent minors. Id. at 409. H.L. left unanswered whether

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[3] Prior to trial, the district court had granted plaintiffs' motion for partial summary judgment, finding unconstitutional the parental consultation requirement. (App. 59-60).

such a requirement would be constitutional if applied to a broader class of minors, since no other kinds of minors had challenged the statute. Id. at 406-07. Indeed, this Court implied that a notification requirement applicable to mature minors, minors with emergency health care needs, or minors with hostile home situations, would present serious constitutional questions. Id. at 406-07, n. 14.

The original plaintiffs in the instant case did not explicitly include minors, the named women plaintiffs having been certified to represent a class of all women in Nebraska seeking abortions. (App. 6). Thus, under H.L., they did not have standing to challenge the parental consultation requirement on the ground that it violated the constitutional rights of mature or "best inter-

ests" minors. The district court responded to this concern on remand by allowing the intervention of two minor plaintiffs, Jane Roe I and Jane Roe II, to represent the interests of mature and "best interests" minors.[4/] The district court then held that insofar as the parental consultation requirement on its face applied to all minors, and that no provision had been made for alternative court procedures, it was unconstitutional, citing Bellotti v. Baird, 443 U.S. 662 (1979) and Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir. 1981),

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[4/] The district court also allowed the doctor-plaintiffs to amend their complaints to add allegations that their patients included mature and "best interests" minors. (App. 77).

664 F.2d 687 (8th Cir. 1982) (supplemental opinion), cert. granted, 50 U.S.L.W. 3934 (U.S. May 24, 1982) (Nos. 81-1255, 81-1623). (App. 79-80).

Contrary to Appellants' assertion, the Eighth Circuit did not disagree with the district court's implicit holding that H.L. had no effect on the standard of review to be applied to the informed consent, waiting period and reporting provisions. Indeed, the Eighth Circuit's citation of Ashcroft, 655 F.2d 848 (1981), in support of its affirmance confirms this conclusion. Ashcroft, which struck down a similar parental notice provision, nowhere intimates that H.L. controls the standard by which courts must review abortion legislation applicable to adult women. 655 F.2d at 857-60.

It is clear that this Court's

vacatur and remand "in light of H.L. v. Matheson" constituted a direction to the lower court to reexamine the standing of the women plaintiffs to raise certain challenges to the parental consultation requirement. Only if the women plaintiffs were found to have such standing, would the district court then be free to rule on the constitutionality of the parental consultation section, in light of the principles enunciated in H.L. and Bellotti v. Baird, 443 U.S. 622 (1979). The lower courts' response to this Court's direction was entirely appropriate.

2. The lower courts were correct in holding unconstitutional the informed consent, waiting period and reporting requirements, under a standard of strict judicial scrutiny.

This Court has consistently applied

the compelling state interest test established in Roe v. Wade, 410 U.S. 113 (1973). That case held that the "right to privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. State interference with fundamental rights can be justified only by a "compelling state interest," and a showing that the regulations are narrowly drawn to serve those interests. Id. at 155.[5/] Those state interests are (1) protecting the health of the pregnant

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[5/] Regulations applicable to first trimester abortions are almost always invalid, since no compelling state interest exists at that stage. Doe v. Bolton, 410 U.S. 179, 195 (1973). Connecticut v. Menillo, 423 U.S. 9, 11 (1975) under-

woman, which does not become "compelling" until the second trimester of pregnancy and (2) protecting potential life, which does not become "compelling" until the fetus is considered by the physician to be viable. Id. at 162-163. Therefore,

> for the period of pregnancy prior to this 'compelling' point, the attending physician in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State. Id. at 163.

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scored that first trimester regulations which "restrict" abortion are permissible only if they insure the existence of medical standards which underlie the finding in Roe of the safety of first trimester abortions.

This Court has reaffirmed the Roe formulation in subsequent decisions; legislation which interferes directly with the abortion right is subject to strict scrutiny. Such laws are unconstitutional if they are not narrowly drawn to serve one of the compelling state interests set forth in Roe.[6/] For instance, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) struck down a statutory prohibition against the use of saline amniocentesis as an abortion technique after the first

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6/ Laws impinging on fundamental rights are "presumptively unconstitutional" Harris v. McRae, 448 U.S. 297, 312 (1980). Once plaintiffs show the requisite degree of interference, defendants bear the burden of proving the law is narrowly tailored to further a compelling state interest. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 76-77 (1976); Doe v. Bolton, 410 U.S. at 195.

12 weeks of pregnancy. This Court found that it did not promote the state's interest in maternal health because abortion by that method was still safer than childbirth, and alternative abortion methods were not yet widely available. This Court further found that the requirement was not narrowly drawn, since other, more dangerous methods were not prohibited. Id. at 76-77. See also Colautti v. Franklin, 439 U.S. 379 (1979); Carey v. Population Services International, 431 U.S. 678-686 (1977).[7/]

[7/] Strict scrutiny analysis need not be employed when a regulation causes no significant burden. The Danforth Court upheld a recordkeeping requirement because it had "no legally significant impact or consequence on the abortion decision." 428 U.S. at 80-81. Similarly, an informed consent requirement, which did not specify the content of the physicians' speech, was found not to interfere with the abortion decision, Id. at 77. The recordkeeping, informed consent and

This Court's rulings on the privacy rights of minors do not undermine the strict scrutiny standard. Bellotti v. Baird, 443 U.S. 622, 633 (1979) recognized that "the status of minors under the law is unique in many respects." Thus, "the State has somewhat broader authority to regulate the activities of children than of adults," Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 74-75, because there are state interests at stake which are not present in the case of adults.

H.L. v. Matheson illustrates this Court's recognition that there are legitimate state interests with regard to

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waiting period requirements in the instant case are not of the Danforth ilk. The district court found that all three imposed very real burdens on women seeking abortions. (App. 39-54).

minors which do not exist in relation to adults. The Utah statute, this Court noted, served the "important considerations of family integrity and protecting adolescents . . ." id. at 411, and it was on this basis that the statute was upheld. Id. at 413. Nothing in H.L. v. Matheson, or indeed in any of the Court's decisions with regard to minors' privacy rights, undermines the basic principle of strict judicial review for abortion-specific legislation established in Roe v. Wade.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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No. 82-1188

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

WOMEN'S SERVICES, P.C., ET Al.

APPELLEES

vs.

CHARLES THONE, GOVERNOR OF THE STATE OF NEBRASKA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Court is moved for leave to file the attached brief amicus curiae by The Legal Defense Fund For Unborn Children.

The interest of the amicus is described in the attached brief.

The amicus curiae brief is not in support of either party. The purpose of the amicus is to defend the constitutional right to life of the unborn, which the parties have not done. The amicus demonstrates that the U.S. Supreme Court has already overruled Roe v Wade, 410 U.S. 113, and that mere argument that these killings can continue without question can be criminally prosecuted. The amicus addresses no arguments to the issues raised by the parties; but the facts and authorities presented by amicus dispose of all the issues raised by the parties.

_____

Alan Ernest
Counsel for Amicus

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AMICUS CURIAE BRIEF BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

Interest Of Amicus Curiae

The Legal Defense Fund For Unborn Children is an organization whose purpose is to protect the constitutional rights of children unborn and born alive. The parties have not done this. This brief is not in support of either party.

Summary of Argument

The amicus curiae submits evidence not submitted by the parties, to show that Roe v. Wade is a mistake of law. The Roe v Wade killings violate the Fifth and Fourteenth Amendments of the U.S. Constitution. Any Justice who takes part in these killings can be criminally prosecuted. One of the giant homicidal frauds in the history of the world has been perpetrated on the American republic. The dagger of the assassin has been concealed beneath the robe of the jurist. This court has already overruled Roe v Wade, and must now do it expressly.

Argument

I. ROE v WADE IS BASED ON FALSE EVIDENCE, AND THE VICTIMS ARE BEING EXTERMINATED IN VIOLATION OF THE U.S. CONSTITUTION.

The evidence, summarized below, proves that the Court's conclusion in Roe v Wade, 410 U.S. 113, 158, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," is based on a fatal reversal of the burdens of proof and persuasion, and indispensable parts of the Court's evidence are fabricated and false. The evidence establishes, beyond the legal power of any federal judge to deny, that the unborn are persons whose lives are protected by the Fourteenth Amendment, as follows:

A.

Even the Court admitted in Roe v Wade, 410 U.S. at 156-157, that if the unborn were "a 'person' within the language and meaning of the Fourteenth Amendment," then the case for a constitutional right to kill the unborn, as claimed in Roe v Wade, "of course collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

B.

The terms of the Fourteenth Amendment ("nor shall any state deprive any person of life ... without due process of law")(emphasis added) are "universal in their application." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The words "any person" admit of no exceptions whatever. Thus, on their face, the words "any person" include the unborn, as everyone else.

C.

The holdings of Chief Justice Marshall show that the Supreme Court had no lawful power to construe an exception to express, universal terms (such as "any person") unless the Court can show that "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[1/] And the Court must further prove that "had this particular case been suggested " to the framers, "the language would have been so varied as to exclude it."[2/]

1./ Sturges v Crowninshield, 4 Wheat. 122,202-3.
2./ Dartmouth College v Woodward, 4 Wheat.518,644-5.

Chief Justice Marshall founded the universality of the Supreme Court's jurisdiction on these very rules. 3/

The Court thus bore a very extraordinary evidentiary burden before it could create an exception to the universal terms "any person" so that victims could be killed in violation of positive criminal statutes. 4/

3./ Cohen v Virginia, 6 Wheat. 264, 378-380.

4./ The truth of this extraordinary evidentiary burden can be demonstrated by applying it to various cases. Before the Court could create an exception to the universal terms "any person" so that Jews, or Catholics, or the insane, could be killed like the unborn, the Court would have to demonstrate that "the absurdity and injustice of applying the provision [the terms- "any person"] to the case [the case of - Jews, Catholics, or the insane],would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, supra. And the Court must prove that if the case of the Jew, Catholic, or the insane had been suggested to the framers of the Fourteenth Amendment, then "the language would have been so varied, as to exclude it." Dartmouth College v. Woodward, supra. The framers would have changed the words of the Amendment to read that "No state shall deprive any person, except Jews, Catholics or the insane, of life ... without due process of law."

These same extraordinary evidentiary burdens must universally apply to all groups whose personhood may be challenged, including the unborn. Thus the Court bore the heaviest evidentiary burden possible in constitutional interpretation in order to create an exception to the universal terms "any person" so the unborn could be killed for any reason, or no reason, in violation of positive criminal statutes.

D.

The Supreme Court presented false evidence in Roe v Wade to support its conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 410 U.S. at 158. And, but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms "any person" to the life of the unborn.[5/]

5./Summary of False Evidence:

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, but, at the same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to kill the unborn?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion statutes were first enacted, the laws were not intended to protect unborn life, but rather were

only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

A.

The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 410 U.S. at 148. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v Wade, supra, at 148n.43. But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western world prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based upon their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864)(American physician). In short, the 19th century obstetric authorities prove the Supreme Court's assertion of fact to be false.

of proof and persuasion, as set out in the holdings of Chief Justice John Marshall. See pages 3-4, supra. Instead of the burden of

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The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

Consequently, the 19th century physicians were using an ancient abortion operation which they described as not hazardous to the woman. The Supreme Court did not examine even one 19th century obstetric textbook. And the medical textbooks prove its assertion of fact, "When most criminal laws were first enacted, the procedure was a hazardous one for the woman," to be false.

B.

The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 410 U.S. at 149. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high," without any authority to support it. It was a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false. The medical authorities, supra, expressly asserted that the abortion operation was not deemed to be hazardous to the mother.

Consequently, the Court's assertion that "Abortion mortality was high" is false.

C.

Upon the two false assertions of fact, the Court falsely infers that"a State's real concern in enacting a criminal abortion law was to protect the

proving that including the unborn within the terms "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the

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pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 410 U.S. at 149. Thus a false inference was drawn from false facts.

D.

From the false inference that the criminal abortion laws were not intended to protect the lives of the unborn, the Court falsely inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 410 U.S. at 158. This false conclusion is drawn from a false inference which is drawn from false facts.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295 (6th ed. 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 12 Transactions of the American Medical Association 27-28(1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 131, 135-36(1868), leave no doubt that these 19th century abortion laws were intended to protect the lives of the unborn. Consequently there is no other body of evidence to come to the Court's rescue.

CONCLUSION

The Supreme Court bore the burden of demonstrating, beyond a doubt based on reason, that the absurdity and injustice of including the unborn within the

U.S. Supreme Court fatally reversed the burden. The Court placed the burden on the unborn to prove with "assurance" (that is, to make certain and put beyond doubt) that they were persons within the terms "any person," or the unborn would be excluded from the terms "any person." Rather the burden was on the Supreme Court to prove

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terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application," Sturges v Crowninshield, supra. And the Court had to prove to a demonstration that if the case of the unborn had been presented to the framers and adopters of the Fourteenth Amendment, "the language would have been so varied as to exclude it." Dartmouth College v Woodward, supra.

But, the Supreme Court did not cite even one single 19th century authority that expressly agreed with its conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," much less one that asserted that there was a constitutional right to kill the unborn, as set out in Roe v Wade. And the court's assertion that the 19th century abortion laws were not intended to protect the lives of the unborn is shown to rest on false evidence.

The legal history demonstrates that the people who framed and adopted the Fourteenth Amendment not only intended it to protect the lives of the unborn, but these people had already enacted criminal abortion laws to do so in fact. This case for the unborn is absolutely conclusive. The terms "any person" must include the unborn.

with "assurance" that the unborn were not included within the terms "any person" or they would be included.[6/] And the evidence for the unborn is far stronger than that for many groups which the Court has judicially recognized to be included within the uni-

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6./ The Court illegally switched the burdens of proof and persuasion in the following manner. The Court first decreed a constitutional right to kill the unborn. Roe v Wade, 410 U.S. at 153. Incredibly, subsequently, the Court examined the question of the personhood of the unborn under the Fourteenth Amendment. Thus, in accordance with its compelling state interest test, once the constitutional right to kill the unborn was established, the burden was on the unborn to demonstrate the compelling justification of the criminal abortion statutes; that is, the burden was on the unborn to affirmatively prove that they were persons within the meaning of the terms "any person" in the Fourteenth Amendment- or be excluded.

Moreover, the objections which the Court raised to defeat the personhood of the unborn in Roe v Wade, 410 U.S. at 156-158 were either false, or irrelevant. This evidence will be submitted to the Court on request. The Court exactly perceived its function as that of a criminal defense lawyer who only has to raise doubts about the prosecution case to win. But the Court cannot exclude anyone from the protection of the words "any person" by merely working up quibbles or "inconsistencies." Roe v Wade, supra, 158 n.54.

Could the Court first decree a constitutional right to kill Jews? And then place the burden on the Jews to affirmatively prove that they are included within the terms "any person"? And then, by quibbling with the Jews' evidence, decide the Jews were not included within the terms "any person" so they could be hauled off to the graveyard?

versal terms "any person." 7/

The Supreme Court has exactly defied the express words "any person" in the Constitution, and their spirit, 8/ as well as the plain intention of the framers, 9/ and condemned to death those victims whom the Constitution endeavors to preserve.

7./ The Court was so certain that "corporations" were included within the terms "any person" that it forbade any oral argument to the contrary. Santa Clara v. So. Pac. RR, 118 U.S. 394,396. And the Court held that "strangers and aliens" were included within the terms "any person" by merely observing: "These terms are universal in their application." Yick Wo v Hopkins, supra, at 369.

8./ The uncontradicted scientific evidence in Roe v Wade showed that the unborn child "is alive," that the fetal heartbeat begins "pulsations at 24 days," and "brain waves have been noted at 43 days."

The Court itself has recognized that, while the Declaration of Independence is not law in itself, yet it is "the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." Gulf, Colo. & S.Fe v Ellis, 165 U.S. 150, 159-160.

The undisputed scientific evidence proves that the unborn child has been "created" and thus endowed with an "unalienable" right to "life," and within the spirit of the terms "any person." The Court would amend the Declaration to read that "all men are created equal-except those created to die for the convenience of others."

9./ The evidence, supra page 5 n.5, shows that the adopters of the 14th Amendment not only intended the lives of the unborn to be protected by the terms "any person," but they had already enacted criminal abortion statutes to do so in fact.

II. THE U.S. SUPREME COURT HAS WILLFULLY USED UNCONSTITUTIONAL PROCEDURES TO EFFECT AND MAINTAIN THE ROE v WADE KILLINGS.

The Supreme Court willfully used unconstitutional procedures to effect the Roe v. Wade killings.[1/]

And the Supreme Court has subsequently decided many abortion cases on the merits, but willfully used unconstitutional procedures to maintain the killings, as follows:

1. The Supreme Court willfully refuses to

1./ Counsel did not especially represent the unborn in the District Courts in Roe v Wade and Doe v Bolton. And the Supreme Court denied Bolton's request to allow counsel to represent the unborn in the Supreme Court. Thus, counsel did not represent the unborn at any stage of the original proceedings.

The question of the personhood of the unborn under the Fourteenth Amendment came up for the first time in the original proceedings after the cases reached the Supreme Court. Since no group had ever been excluded from the protection of the Fourteenth Amendment so they could be killed, the original parties had no notice of the kind of evidence, or the burdens of proof and persuasion the Court would deem determinative. The first time the parties understood this was when Roe v Wade issued, and the victims were condemned to death. But the Court had taken judicial notice of numerous facts and factors which the original parties had not seen, much less cross-examined in a judicial proceedings. An original party asked permission to cross-examine the Court's evidence. But the Supreme Court would not allow its evidence to be cross-examined.

allow retained(no cost to taxpayers)counsel to represent the victims being killed; [2]

2. The Supreme Court willfully refuses to allow the evidence in Roe v Wade, which it used to condemn the victims to death, to be cross-examined; [3]

3. The Supreme Court willfully refuses to allow evidence to be presented on behalf of the victims being killed to establish their right to life under the U.S. Constitution.[4]

The U.S. Supreme Court's own rulings on due process of law show these procedures to

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2./ Some of these cases are: Colautti v Franklin, 58 L Ed 2d 596, motion to allow counsel represent unborn denied 57 L Ed 2d 1131(1978); Anders v Floyd, 59 L Ed 2d 442, motion to allow counsel represent unborn denied 58 L Ed 2d 235(1978); Bellotti v Baird, 61 L Ed 2d 797, motion to allow counsel represent unborn denied 59 L Ed 2d 29(1979); Ashcroft v Freiman, 59 L Ed 2d 630, motion to allow counsel to represent unborn denied 59 L Ed 2d 630(1979); United States v. Zbaraz, 65 L Ed 2d 831, motion to allow counsel represent unborn denied 62 L Ed 2d 665-6(1980); Harris v. McRae, 65 L Ed 2d 784, motion to allow counsel represent unborn denied 63 L Ed 2d 775(1980); H.L. v. Matheson, 67 L Ed 2d 388, motion to allow counsel represent unborn denied 64 L Ed 2d 234 (1980).

3./ Supra Note 2.

4./ Supra Note 2.

to be unconstitutional[5/] and criminal.[6/]

5./ The U.S. Supreme Court has held that even in civil, non-judicial proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) Notice; (2) the right to be heard and to present evidence; (3) the right to confront and cross-examine adverse evidence; (4) the right of representation by retained counsel; (5) the right of an independent decisionmaker; (6) the right to have a written statement by the decisionmaker of the evidence relied upon and the reasons for the determination. Goldberg v Kelly, 397 U.S. 254, 268-271(1970). In Re Gault, 387 U.S. 1(1967); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v Scarpelli, 411 U.S. 778 (1973); Viteck v Jones, 63 L Ed 2d 552 (1980). Since the unborn are being killed, there can be no question whatever that these elements of due process of law are guaranteed.

6./ The criminality of such process is evident. Could a judge use such procedures to legalize the killings of the insane, or Jews? These are effectively the same procedures cited by the Nuremberg Court in convicting the Nazi judges of criminal extermination. United States v Altstoetter(The Justice Case), 3 Trials of War Criminal Before the Nuernberg Military Tribunals 1046(1951).

Can it now be argued that a judge, who could not condemn even one Jew to death without counsel in a criminal case, could condemn all Jews in the United States to death without counsel by calling it a civil case and decreeing that the lives of Jews were not protected by the Constitution? A person cannot be deprived of life or liberty without due process of law, regardless of the description of the proceeding. The Constitution thus guarantees that any proceeding to determine if one is a person within the meaning of the Constitution must satisfy due process of law.

And any judge who willfully deprives any victims of constitutional rights under a guise of law can be criminally prosecuted. Imbler v. Pachtman, 424 U.S. 409 (1976).

III. THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v WADE, 410 U.S. 113 (1973).

For the 83rd time, the U.S. Supreme Court is accused in its own court with criminally exterminating millions of lives in violation of the U.S. Constitution, and 18 USC 242.[1/]

For the 59th time, the U.S. Supreme Court is accused in its own court with mass murder in violation of state and federal statutes.[2/]

For about the 43rd time, the U.S. Supreme Court is accused in its own court with willfully using unconstitutional, criminal procedures to maintain the Roe v Wade killings.[3/]

But, year after year, the U.S. Supreme Court has not denied the charges, much less

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1./ Charges based on evidence, supra page 2.

2./ Charges based on evidence presented in MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE, incorporated herein by reference.

3./ Charges based on evidence, supra page 12. The evidence makes it plain why the U.S. Supreme Court is willfully using unconstitutional procedures to maintain the killings. The evidence proves, beyond the power of any federal judge to deny, that the charges are true.

attempted to prove the charges to be false. This silence year after year in the face of accusation, while the victims are being killed, amounts to a confession in court that the charges are true.[4/] This tacit admission that Roe v Wade is a mistake of law is the legal equivalent of the express overruling of Roe v Wade. Any judge or party who chooses to close his eyes on these

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4./Under "the tacit confession rule," McCormick on Evidence §§ 161, 270, failure to deny a charge is equivalent to a confession that the charge is true. 4 Wigmore, Evidence, §§ 1071-1072(Chadborn rev 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick, supra, §161. And the Supreme Court itself has consistently recognized this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact. .... Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 425 U.S. 308, 319(1976). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago, "you are silent and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying." And again, "I may assume that your silence gives assent." Apology in Plato 41, 45 (Jowett trans. Classics Club 1942).

And concerning the Court's continuing silence year after year, "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. at 176.

unparalleled facts, and argues that the killings can continue without question, can be prosecuted for complicity in criminal extermination just as if he had encouraged the killings after Roe v Wade was expressly overruled.[5/]

5./ The Supreme Court asserted to legalize killings which violated positive criminal statutes, including murder statutes. If Roe v Wade is a mistake of law, then all the killings since 1973 can be criminally prosecuted. The ex post facto provisions of the U.S. Constitution do not apply to judicial decision which are a mistake of law. Ross v Oregon, 227 U.S. 150(1913). The general rule is that mistake of law is no excuse for breaking the law. Perkins, Criminal Law 920(2d ed. 1969). The narrow exception of reasonable reliance on a court opinion thereafter determined to be a mistake of law does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments § 2.04, page 138. In any event, "after a warning," such as given herein, a defendant can not claim his reliance was reasonable. Id., at 138. And one can be criminally implicated in homicide by mere words of encouragement while the victims are being killed. Lafave and Scott, Criminal Law §§ 61,64(1972).

To illustrate the true status of Roe v Wade, suppose that a lawyer had accused "the supreme judge" of Nazi Germany of mass murder 50 times in court, but each time "the supreme judge" listened in silence and did not deny the charge and prove it false, and just continued the killings. Would such judicial conduct have warranted people in arguing that the killings could continue without question? The Nuremberg Court answered that question. Such argument amounts to criminal complicity in extermination.

Roe v Wade has been overruled. In the face of these unparalleled facts, one must literally gamble life and liberty to support it. Many states still punish mass murder with the death penalty.

CONCLUSION

The Supreme Court has perpetrated one of the giant homicidal crimes in history on the United States. And the corruption of a judicial system for the accomplishment of criminal extermination involves an element of evil which is not found in frank atrocities which do not sully the judicial robes. The dagger of the assassin has been concealed beneath the robe of the jurist.

By its conduct, the U.S. Supreme Court has overruled Roe v Wade, 410 U.S. 113. Mere argument that the killings can continue can be criminally prosecuted. To save innocent lives from extermination, and uninformed persons from prosecution, the Supreme Court must expressly overrule Roe v Wade.

Alan Ernest
Counsel for Amicus

No. 82-1188

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

WOMEN'S SERVICES, P.C., ET AL.
APPELLEES

vs.

CHARLES THONE, GOVERNOR OF THE
STATE OF NEBRASKA, ET AL

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v Wade, 410 U.S. 113, as counsel or guardian ad litem.

Interest of Counsel

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His interest is to defend the constitutional right to life of the children unborn and born alive being killed pursuant to Roe v. Wade. The parties have not done this.

This is effectively a motion to allow retained counsel to represent the victims being killed, since there will be no expense to this Court, or to the taxpayers.

Summary of Argument

In Roe v Wade, the Court asserted to legalize killings which had been defined as murder since long before the adoption of the Fourteenth Amendment. Thus, Roe v Wade is no law at all, and should be expressly overruled.

This will dispose of all the issues raised by the parties.

The victims being killed are entitled by the U.S. Constitution to be especially represented by retained(no cost to taxpayers) counsel who has authority to cross-examine the evidence in Roe v Wade, which the Court used to condemn the victims to death, and to present evidence on their behalf to establish their right to life under the U.S. Constitution.

It can not be pretended that it is any longer the government of the United States, or any government of Constitution and laws, wherein judges Hitler-like assert to legalize mass murder, and then maintain the killings by willfully refusing to allow retained counsel to represent the victims being killed and defend their right to life protected by the Constitution.

The amicus curiae brief by the Legal Defense Fund For Unborn Children filed herein is incorporated by reference.

ARGUMENT

ROE v WADE IS NO LAW AT ALL, SINCE THE COURT HITLER-LIKE ASSERTED TO LEGALIZE KILLINGS DEFINED AS MURDER SINCE LONG BEFORE THE ADOPTION OF THE FOURTEENTH AMENDMENT

Counsel presents new evidence herein,[1/] not presented by the parties, to show that many of the killings that the Supreme Court asser-

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1./ The new evidence was published in The Washington Post on September 12, 1979, under the caption "WASHINGTON LAWYER CHARGES U.S. SUPREME COURT WITH MASS MURDER," as set out below. That the charging evidence can be published in the dominant newspaper in the nation's capital, but, as the victims are being killed, the evidence can not even be heard in this Court, proves the complete criminal degeneracy of the judicial system. The newly discovered evidence shows the Court asserted to legalize killings defined as murder since before the adoption of the 14th Amendment.

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence shows that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is not law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein shows that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by

ted to legalize in Roe v Wade, 410 US 113, had thereto been defined as murder. It is just as if the Court asserted a right to kill Jews. Obviously, absent a constitutional amendment, these killings are still murder. Justices who have presumed to permit these killings may now be facing the death penalty in very many states.

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the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months of gestation; nor did it mean birth after viability, "that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 410 US at 160. If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penalty.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade. This is essentially a Caesarean in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder, and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

Many people would no doubt be astonished to learn that the case presented herein for the unborn is the very case they would have to present for themselves if their right to life were challenged. For example, take almost any group of persons, such as the insane, invalids, Jews or Catholics. Suppose it were claimed in federal court that the

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2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins Ch. 13, s. 16) and Blackstone(4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killings of children born alive as murder. Rex v Senior, 1 Moody CC 346 (1832); Reg. v Trilloe, 174 Eng. Rep. 674 (1842); Reg. v West, 2 C & K 784 (1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848, the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb " of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A "medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable

right of "privacy" announced in Roe v Wade includes the right to kill members of these groups, as well as the unborn. If the burden were suddenly thrust on these groups, as it was thrust on the unborn, to prove that they are persons whose lives are protected by the Fourteenth Amendment, what factual, non-argumentative evidence could they find to estab-

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of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness, Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of opinion(and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A

lish their right to life?

As the case of the unborn shows, it would do no good to object that no one ever heard of such a constitutional right to kill, or to object that such killings had thereto been defined as criminal. And the Fourteenth Amendment merely states that it pro-

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Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed. 1866). Consequently, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder in 1868.

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala. 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative definitions on the law of homicide of children born alive. See, e.g., Clarke v. State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519(1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law of Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

tects life of "any person." So, as with the unborn, the Amendment does not expressly refer to the insane, or invalids, or Jews, or Catholics; and its legislative history does not appear to specifically refer to any of these groups. As with the unborn, the murder laws do not expressly refer to the insane,

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Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killings of these children to be a constitutional right without any examination whatever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional

or invalids, or Jews, or Catholics; and their legislative histories, to the extent they have any, do not appear to specifically refer to any of these groups. The principle in the Declaration of Independence, that all people are "created" equal and endowed with an unalienable right to "life," having been

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right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, Commonwealth v. Edelin, 359 NE 2d 4(Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. 1 Hearings Before the Subcommittee On Civil And Constitutional Rights Of the Committee of the Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397 (94th Cong., 2nd Sess. 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry .... Almost all were born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

sneered out of court in the unborn's case, now provides no assurance for anyone. So what factual, non-argumentative evidence is there for members of these groups to protect themselves from extermination?

The case presented herein for the unborn,

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6. Roe v Wade and Mistake of Law

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions that are a mistake of law. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law, and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269 (Pa. 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries); or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals"

supra note 1, is thus the case for everyone else. The common law is the dictionary; it has traditionally been used to define the terms of the homicide statutes. It is this same body of factual evidence upon which all groups must ultimately rely to establish

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has also been a textbook definition of perjury. See, 3 Wharton's Criminal Law and Procedure, § 1308, p. 673 (12th ed. 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But, as Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." Holmes, The Common Law 41 (Howe ed. paperback 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass

their right to life. The evidence, supra n.1, conclusively proves that the Supreme Court has Hitler-like, that is, by naked decree without any investigation of the law of murder, asserted to legalize mass murder. Roe v Wade is a mistake of law, that is, no law at all. All the countless thousands of

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murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 985 (GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

born alive Roe v Wade killings since 1973 can be prosecuted as murder. Anyone who takes part in this national scheme of on-going killings in any intentional manner whatever, even by mere words of encouragement in Court, can be prosecuted for complicity in mass murder just as if Roe v Wade had never been decided. The Supreme Court is not above the law of murder. Roe v Wade is no law at all, and ought to be expressly overruled to reflect the true state of the law.

The evidence shows that the United States is being ruled over by a tribunal of murderers which has Hitler-like asserted to legalize mass murder, and maintains the killings year after year by willfully refusing to allow counsel to represent the victims being killed and defend the victims right to life under the U.S. Constitution. But even the Supreme Court is not above the law of murder, and many states still punish mass murder with the death penalty.

THE VICTIMS BEING KILLED BY ROE v WADE ARE CONSTITUTIONALLY ENTITLED TO BE ESPECIALLY REPRESENTED BY RETAINED COUNSEL TO DEFEND THEIR RIGHT TO LIFE UNDER THE CONSTITUTION.

The victims being killed have a constitutional right to be especially represented by retained(no cost to taxpayers) counsel to defend their right to life under the U.S. Constitution. 2/

Alan Ernest
Counsel

2./ Goldberg v Kelly, 397 U.S. 254, 268-270(1970). In Re Gault, 387 U.S. 1(1967); Morrissey v Brewer, 408 U.S. 471 (1972); Gagnon v Scarpelli, 411 U.S. 778(1973); Viteck v Jones, 63 L Ed 2d 552(1980); Gideon v Wainwright, 372 U.S. 335 (1963); United States v Altstoetter(The Justice Case), 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046 (1951).

The right to retained counsel under these circumstances is certain and indisputable. It can not be pretended that it is any longer the government of the United States, or any government of Constitution and laws, wherein judges assert to legalize mass murder, and then maintain the killings year after year by willfully refusing to allow counsel to represent the victims being killed and defend their right to life under the Constitution.

The amicus curiae brief filed herein by the Legal Defense Fund For Unborn Children is incorporated by reference in its entirety.

A-1

The photograph, supra A-1, shows a second stage abortion by prostaglandin. Such abortions not uncommonly result in the child being born alive.[1/] This Court could be prosecuted for murder for such a killing. There have been many thousands of such killings under Roe v Wade. And witnesses live to tell.

And if the child were killed in the womb and born dead, then this Court could be prosecuted for criminal extermination in violation of the Fifth and Fourteenth Amendments and 18 U.S.C. 242.[2/]

As the Court studies the face of this victim of Roe v Wade, let it contemplate that a government of laws shall be restored, and the law shall call the killers to account.

1./ Floyd v Anders, 440 F. Supp. 535,538(1977). The common second stage abortion techniques-hysterotomy, prostaglandin, and even salt poisoning-can result in the child being born alive. Jefferies & Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981.

2./ The amicus curiae brief by the Legal Defense Fund For Unborn Children shows that the unborn are persons whose lives are protected by the Fifth and Fourteenth Amendments of the U.S. Constitution.Thus their lives are also protected by 18 U.S.C. 242.

END OF DOCKET